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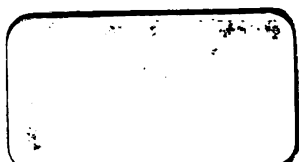
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REPORTS

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OF

CASES IN, LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM SAVANNAH TERM, TO AMERICUS TERM, 1852,
INCLUSIVE.

THOS. R. R. COBB, REPORTER.

VOL. VI.

No. 7
Law School

ATHENS, GA.

CHRISTY & KELSEA

1853.



Entered according to the Act of Congress, in the year 1851, by **THOMAS**
R. R. COBB, in the Clerk's Office of the District Court of the Northern
District of Georgia.

JUDGES OF THE SUPREME COURT.

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Hon. HIRAM WARNER, Greenville.
Hon. EUGENIUS A. NISBET, Macon.
THOS. R. R. COBB, Reporter, Athens.
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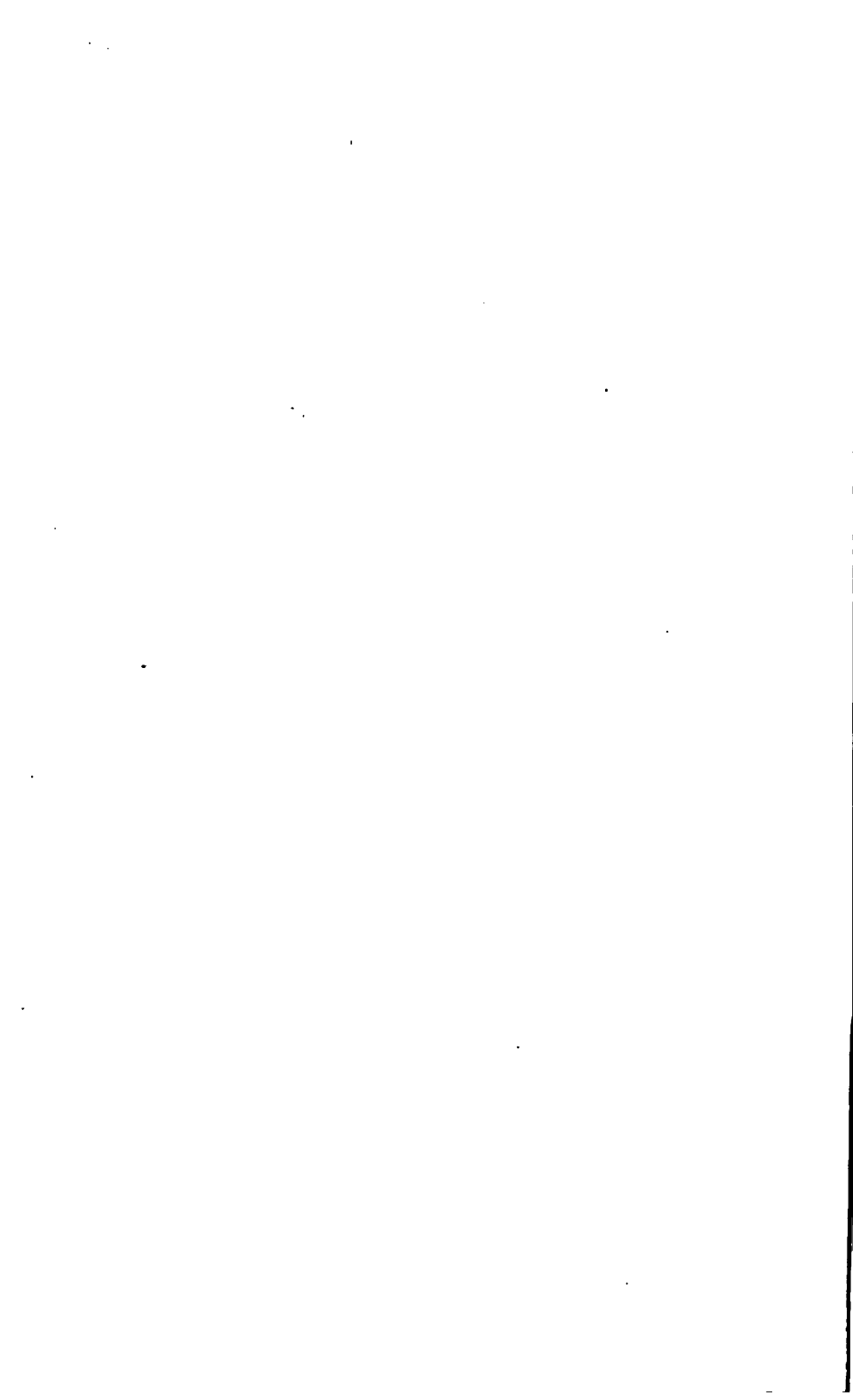
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JANUARY TERM, 1852.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 1.—FURNEY C. AVEN, plaintiff in error, *vs.* ALLEN B. BECKOM, defendant.

1. An administrator having sold a slave as the property of the estate which he represented, under an order of the Court of Ordinary, warranted the property to be sound, *so far as the office of administrator authorized him*; *Held*, that he is personally liable upon this warranty.
2. To an action on this warranty, the administrator pleaded a release, and proved by two witnesses that a misunderstanding having arisen between him and the purchaser about the warranty, the latter told the witnesses "that he was satisfied about the negro, as he knew him better than the administrator, for he had a wife at his house?" *Held* that this was no evidence to support the plea.

Covenant, in Twiggs Superior Court. Tried before Judge
HANSELL, October Term, 1851.

This was an action by A. B. Beckom, against F. C. Aven, for
a breach of warranty of soundness in a negro. The negro was

Aven vs. Beckom.

sold by Aven as administrator on the estate of James A. Young, and in the bill of sale made by him, was the following warranty: "And the said Furney C. Aven, administrator, warrants said negro constitutionally sound; and he also warrants and defends the title to said negro, to said Allen Beckom, his heirs, executors and administrators, against the claim of himself, his heirs and all other persons whatsoever, so far as the office of administrator authorizes him, forever."

This suit was against Aven individually, and the first and main question made in the Court below was, whether Aven was individually liable upon this warranty. The Court held him liable, and this is the first error assigned.

Defendant below pleaded a subsequent release from the warranty, and in support thereof, introduced two witnesses, who swore "that some misunderstanding having arisen about the warranty, Beckom told them that he was satisfied about the negro, as he knew him better than Aven, for he had a wife near his house." The Court charged the Jury that there was "no evidence before them to support the plea of release." This is also assigned as error.

POE & NISBET, for plaintiff in error.

C. B. COLE, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The great question in this case is, whether the plaintiff in error is personally liable upon this warranty of soundness. After the discussion, we are not enabled to consider it open. We must consider it as settled upon authority, against the plaintiff in error. Were it an open question, I must say, I would hesitate to charge an administrator, personally, upon a warranty of soundness of property, sold under an order of Court, made as administrator, and without evidence that he intended to charge himself.

An executor or administrator is not, by any obligation of his trust, required to warrant the title or the soundness of pro-

party, which, in the execution of that trust, he is required to sell. *Caveat emptor* is the warning which the purchaser must take at his peril. He is bound only by an express undertaking so to be. He may bind himself—there is nothing to forbid this; and farther, it is well settled that upon any contract originating with himself, he cannot charge the estate which he represents. *Worthy et. al. vs. Johnson et. al.* 8 Ga. R. 236.

When, therefore, an administrator, in his representative character, warrants the soundness of property which he sells as the property of the estate which he represents, the estate cannot be made liable thereon. By the terms of such a warranty, we are constrained to believe that he does not intend to bind himself personally; and farther, that the purchaser does not believe that he intends to become personally responsible. It is therefore argued that the warranty is a mere nullity; and it really seems quite a hardship to charge one with liability on a contract in which he has no interest, and by the terms of which he has not bound himself. Still to this extent have the Courts gone. They have held that if neither party understood the undertaking to be personal, and it is in terms representative, yet the administrator is liable, *de bonis propriis*. The case of *Sumner, administrator, vs. Williams et. al.* decided by the Supreme Court of Massachusetts, is the leading American authority upon this subject. This case was twice argued, and received the most careful consideration of that able Bench. The Court was divided, *Sedgewick, J.* dissenting, but the decision has stood the test of the severest scrutiny. By that decision an administrator was held personally liable upon a warranty of title made in his representative character. I refer to it now, to sustain the proposition, that upon such a warranty, he is personally liable, even although both parties do not intend him to be bound. *Parker, Ch. J.* in concluding his opinion. says: "This course of reasoning and the authorities referred to, have satisfied me that the defendants are personally bound by the deed which they have executed, as administrators, notwithstanding their manifest intention not so to be bound." 8 Mass. R. 162.

When this warranty was given, it must have been believed

by the purchaser, to be intended to afford him some security for the soundness of the property. It is not reasonable to suppose that he asked, and that the administrator gave a warranty without a purpose. This would be to attribute puerile folly to both parties. It may be true that the administrator did not intend to bind himself, and knew that he could not bind his estate ; yet, it must be inferred from the fact that a warranty was given by the administrator, that the purchaser understood this warranty to be an undertaking on his part to bind the estate. It being under seal, precludes all inquiry as to consideration. The rule, as applicable to the case, and the principle upon which the decisions against the administrator rest, is this : " whenever a man, by an instrument under seal, undertakes to stipulate for another, if he acts without authority or beyond his authority, he is answerable, personally, for the non-performance of the contract." This is a doctrine of the law of agency, too well established to admit of denial. A familiar illustration of the rule is found in the case of *Palmer vs. Stephens*, 1 *Denio*, 471 ; and there also, the reason upon which it is based is clearly expressed by *Beardsley, J.* In that case the defendant had executed a note in the name of another, without authority. *Beardsley, J.* said, " The name, *G. Stephens*, was written by the defendant, and he undoubtedly intended to bind some person or persons by that signature. If no one else was bound, as the plaintiff insists was the fact, the defendant was clearly liable, for if one assuming to be agent of another person, executes a note in his name, having in truth no authority for that purpose, the assumed agent is himself bound by the signature." So an attorney, stipulating for his principal, not having authority. 5 *East. R.* 148.

A guardian is personally liable, upon this principle, upon a note made by him as guardian. *Thatcher vs. Dinsmore*, 5 *Mass.* 299. So also, an administrator, assigning a negotiable note, payable to the order of his intestate, in his capacity as administrator, although the transfer by virtue of his office is good, is personally liable upon an implied guaranty of payment, arising under the custom of merchants. 1 *D. & E.* 487. And in *Barry vs. Rush*, it was decided that an administrator was liable upon

an express undertaking, *as administrator*, to perform an award touching the affairs of his intestate. 1 *D. & E.* 691. In these cases and many more of like character, it is clear that the parties held bound, never intended to bind themselves; yet it was ruled, that inasmuch as they could not bind those for whom they stipulated, they were themselves bound. In reference to the equity of the rule, *Ch. J. Parker* remarks: "Neither is it unjust, that men pretending to give security to others, by assuming a relation that does not belong to them, should supply out of their own means, the security which they failed to impose upon their principals; and this, though they were chargeable with no fraud, for negligence of the rights of others is a ground of liability, without any advantage to the person who is to become responsible. If the administrator has in good faith paid the purchase money into the estate, and there is a recovery against him on the warranty, I see no reason why a Court of Chancery should not reimburse him out of the estate. There is no equity in the estate's retaining against him the price of unsound property, under such circumstances." 8 *Mass.* 209. The liability does not depend upon fraud—it is in these cases perfect without fraud in fact. If it could be made to appear that the agent knows at the time that he cannot bind his principal, by the stipulation into which he enters, then I apprehend that he is chargeable with fraud; and if this cannot be made to appear, he is liable still, upon the ground that he has, to the injury of another, *assumed* to do what, in law, he cannot do; and it is not a sufficient reply that the purchaser is presumed to know the general law, as well as the agent. The purchaser at an administrator's sale, buys at his peril, as to title and soundness. He has no right to ask or expect a warranty, either from the estate or the administrator, personally, for the reason that the law does not permit the former, and does not require the latter; so that when no warranty of any kind is given, and the purchaser is loser, he has no cause of action or complaint. But if the administrator undertakes voluntarily to bind the estate, the case is different. The purchaser then acquires rights which spring out of such voluntary undertaking. Some effect is to be given to the undertaking—

to the warranty in this case—and as the law pronounces it a nullity, so far as the estate is concerned, the only legal effect of which it is capable, is to make it obligatory upon the administrator. The natural inference to be drawn from it is, that he has, or believes himself to have, authority to bind the estate. His act in making the stipulation, has the effect of drawing the other party into his reciprocal engagements, and when the law charges him, personally, he has not, therefore, so much cause to complain. He may be asked why make a warranty at all, since you are not required to make it? *Dunlap's Paley on Agency*, 386. 2 *Kent's Com.* 630. *Story on Agency*, §264. 3 *Johns. Cas.* 70. 1 *Cowen*, 513. 7 *Ibid*, 453. 1 *W. & S. R.* 222. 8 *Wend.* 494. 16 *Mass.* 461. 3 *B. & Adol.* 114. 11 *Mass.* 97. 7 *Wend.* 315. 2 *Taunt.* 385. 1 *Esp. R.* 112. *Smith on Mercantile Law*, 97, 80. 8 *Mass.* 178.

In regard to personal liability, there is a distinction between private agents and agents of the Government. A public agent is not personally liable on a contract made on behalf of the Government, according to the terms of which a private agent would be bound personally. The reasons are that the public agent is not to be presumed as intending to bind himself for the Government, and the party who deals with him, is justly supposed to rely upon the good faith and ability of the Government. Policy too, requires his exemption from liability, for the necessary and heavy agencies of Government, would not be readily filled, if, for its vast engagements, there was danger of a personal liability. He may, notwithstanding, stipulate to be personally responsible. 2 *Kent*, 632. 1 *Term R.* 17. *Ibid*, 674. *Brod. & Bing.* 572. 1 *Mass.* 208. 9 *Ibid*, 496. 1 *Cranch*, 345. 12 *Johns.* 444. 15 *Ibid*, 1. 3 *Conn.* 560. *Dunlap's Paley's Agency*, 376. 3 *Dallas*, 384. 7 *Cowen*, 455. 8 *Ibid*, 191.

There can be no doubt but that executors and administrators come under this general doctrine of agency; whether they be called agents or trustees, the reason of the rule applies to them with all its force. They have no power to bind their estates, and when they assume to do so, like mere agents, exceeding their power, or acting wholly without power, they bind themselves

The case in *8th Mass. Reports*, was the case of administrators, and in its principles and main facts like the case before me. In that case, the administrators, upon a sale, under an order to sell the real estate of their intestate, of the equity of redemption in mortgaged premises, in their character as administrators, warranted the title. They were held liable, personally, in an action on their covenant of warranty. The only difference between this case and the case at this bar, is that here there is a warranty of soundness of a slave, instead of the title to real estate, as there. This difference makes no distinction in principle. The opinion of *Ch. J. Parker* in that case, was put upon the principle before stated, and upon authority. We could not decide this case differently, without overruling the Supreme Court of Massachusetts, when at its meridian of strength, as well as decisions which preceded its judgment, in England, to say the least of them, analogous in principle, and decisions which have followed it in this country. See farther, 3 *Howard's Miss. R.* 176. 14 *Conn. R.* 245. 7 *Monroe R.* 1. 3 *Porter's Ala.* 221. 2 *Mass.* 245. 1 *Brown's Ch. R.* 101. *Ambler*, 707. 5 *B. & Ald.* 34. *Smith's Mercant Law*, 144-'5-'6-'7, and notes. 9 *Wheat. R.* 743. 3 *B. & Ad.* 114. 3 *T. R.* 761. *Bany vs. Rush*, 1 *D. & E.* 691.

The counsel for the plaintiff in error, conceding the liability of the administrator, when he contracts *as administrator*, generally, according to the principles before stated, claims that this case does not come within the rule. He holds, (what is true) that an administrator, may protect himself from personal liability, by an *express* stipulation that he shall not be so liable, and that this is such a case. The conclusion which the counsel arrives at, is drawn from the words of this warranty; they are as follows, "and the said Furney C. Aven, administrator, warrants said negro constitutionally sound; and he also warrants and defends the title to said negro, to said Allen Beckom, his heirs, executors and administrators, against the claims of himself, his heirs, and all other persons whatsoever, *so far as the office of administrator authorizes him, forever.*" I cannot construe these words into a declaration that the party is not personally bound. It is true that he says that he warrants, so far as the office of administrator

authorizes him, and the inference unquestionably is, that he intends to be bound so far, and no farther; that is not personally bound. But is not precisely the same thing inferrable in cases where the administrator warrants, *in his representative character*, or *as administrator*, as in the case in *8th Mass.*; and yet those are the very cases to which the rule has been applied. If it applies to them, with equal clearness, it applies to this. The extent of the undertaking is the same. In both cases, I admit, that it is plainly inferrable, that the party does not intend to bind himself; yet let it be remembered that the doctrine is, that upon these warranties, the administrator is personally liable, although it be clear that his intention was not to bind himself. If the administrator, in explicit terms, stipulates that he shall not be bound, the other party would be also bound by the stipulation; and the warranty, binding neither the estate nor the administrator, would be a mere nullity. But this is not done in this case. I cannot distinguish it from cases where the party contracts, *as administrator*. Contracting *as administrator*, he contracts, *so far as the office of administrator authorizes him*; and contracting *so far as the office of administrator authorizes him*, he contracts *as administrator*.

We do not consider that there is anything in the idea of the counsel for the defendant in error, that the warranty of soundness is distinct from the warranty of title, thus making the former, in terms, a personal covenant. Whatever the restrictive final clause is worth, (and by our ruling, it is worth nothing to the plaintiff in error) it applies to both title and soundness.

[2.] The defendant below pleaded a release, and two witnesses were introduced to support this plea, who testified "that some misunderstanding having arisen about the warranty, Beckom told them that he was satisfied about the negro, as he knew him better than Aven, for he had a wife near his house." The Court charged the Jury that there was no evidence before them to support the plea, which is excepted to.

The Court below was right. This evidence does not prove a release, nor does it, in any degree, support the plea. What the witnesses prove, to wit; that the purchaser was satisfied as to the soundness of the negro—that he knew him better than Aven,

and that he had the means of knowing him—he, the negro, having a wife at his house—being taken as true, does not, in whole or in part, prove a release. He may have known him at the time of the purchase better than Aven, and may have then been satisfied with his condition, and yet, out of abundant caution, taken the warranty—so, for the same reason, notwithstanding these things, after the purchase, retained the warranty.

Let the judgment be affirmed.

No. 2.—JAMES P. GUERRY and Wife and others, plaintiffs in error, vs. HARDY DURHAM and others, defendants in error.

- [1.] Where a bill in Equity is not answered, the same may be taken *pro confesso* at the second term, and a decree had thereon.
- [2.] Where a decree in Equity was obtained, and is sought to be impaired by the complainants, and the defendants file a bill to review and reverse the decree, upon the ground that it was never served, and that the entry and return of service by the Sheriff was fraudulently directed and procured to be made by the party or their attorney: *Held*, that Chancery will entertain such a bill, and grant relief thereon, provided it be brought within twenty years from the time of the first judgment.
- [3.] The failure to give bond and security previous to the granting of an injunction, is no cause for dismissing a bill.
- [4.] Under the amendatory Act of 1842, the Judges of the Superior Courts may grant an injunction upon such terms as in their discretion the case may require. They may dispense with security altogether, provided it be not needed for the protection of the party against whom the injunction is to operate.

In Equity, in Twiggs Superior Court. Decision by Judge HANSELL, October Term, 1851.

James R. Lowery died, and Thomas J. Perryman became his administrator—Hardy Durham being the surety upon his bond.

Guerry and Wife et al. vs. Durham et al.

In 1841, James P. Guerry, in right of his wife, one of the children of Lowery, and as guardian for three of the minor children, and John Williams in right of his wife, and as guardian of another minor child, filed their bill, in Twiggs Superior Court, against Perryman, as administrator, for an account. At the trial term, there being no answer, the bill was taken, *pro confesso*, and a verdict was rendered by the Jury for \$2048 54, for each complainant. On this verdict, a judgment or decree was entered, in favor of Guerry individually, and as guardian for the three minors, for four times the said sum.

Subsequently, a suit was commenced on the administrator's bond, against Durham the surety, and a judgment obtained for a sum smaller, by several thousand dollars, than the decree against Perryman. To indemnify Durham, (who paid off the judgment,) Perryman transferred to him, among other things, a note (not negotiable) made by James P. Guerry to Perryman; Durham transferred this note to one John Dennard, who commenced suit thereon, in the name of Perryman for his use. To this suit, Guerry pleaded as a set-off, the balance due on the decree recovered by him against Perryman, and at the same time filed a bill in Equity, in order to get this equitable claim allowed as a set-off.

Pending this suit, in November, 1849, Hardy Durham, John Dennard and Thomas J. Perryman, filed their bill in Twiggs Superior Court, in the nature of a bill of review, setting out the foregoing facts, and praying a review and reversal of the decree rendered upon the original bill against Perryman. This bill alleged farther that, "at the time of the filing of the said bill, Perryman was not a citizen or resident of the State of Georgia, but had long before left said State, and removed to the State of Texas, and has never been in Georgia since, and that the complainants in the said bill, by themselves or their attorneys, with a full knowledge of the fact, directed or procured the Sheriff of Twiggs County to return on said bill, that he had served the same, by leaving a copy at the most notorious place of abode of said Perryman, in the County of Twiggs, when in fact, he had no such residence."

The grounds or reasons assigned for the review were, 1st. Because there was no service of the bill upon Perryman.

2d. Because the bill was taken *pro confesso*, and a decree taken at the second term.

3d. Because the decree does not follow the verdict.

The bill also prayed for an injunction to restrain Guerry from pleading the said decree, or in any manner using it against the suit of Dennard against him. This bill was sanctioned, and injunction granted by Judge Warren, who, in the order granting it, stated that "it was represented to him, that the Judge of the Southern Circuit was absent from the Circuit."

To this bill a demurrer was filed, on the grounds, among others :

1st. That there is no allegation that the decree has been signed and enrolled, or performed, or bond and security given for its performance.

2d. Because there is no equity apparent upon the face of the bill.

3d. Because there was no *petition*, supported by affidavit, previous to the sanction of the bill.

4th. Because of the *laches* and lapse of time before complainants applied for the aid of the Court.

At the same time, there was a motion "to dismiss the bill for improvident sanction," on the grounds, among others :

1st. Because the bill was sanctioned without the payment of costs of the former suit, and without giving bond and security for the eventual condemnation money and future costs.

2d. Because it is no where shown that the Judge of the Southern Circuit was absent from his Circuit at the time the bill was sanctioned.

The Court below overruled both the demurrer and the motion, and on this decision error has been assigned.

SCARBOROUGH (represented by B. HILL,) for plaintiff in error.

COLE and S. T. BAILEY, for defendant in error.

Guerry and Wife et al. vs. Durham et al.

In 1841, James P. Guerry, in right of his wife, one of the children of Lowery, and as guardian for three of the minor children, and John Williams in right of his wife, and as guardian of another minor child, filed their bill, in Twiggs Superior Court, against Perryman, as administrator, for an account. At the trial term, there being no answer, the bill was taken, *pro confesso*, and a verdict was rendered by the Jury for \$2048 54, for each complainant. On this verdict, a judgment or decree was entered, in favor of Guerry individually, and as guardian for the three minors, for four times the said sum.

Subsequently, a suit was commenced on the administrator's bond, against Durham the surety, and a judgment obtained for a sum smaller, by several thousand dollars, than the decree against Perryman. To indemnify Durham, (who paid off the judgment,) Perryman transferred to him, among other things, a note (not negotiable) made by James P. Guerry to Perryman; Durham transferred this note to one John Dennard; who commenced suit thereon, in the name of Perryman for his use. To this suit, Guerry pleaded as a set-off, the balance due on the decree recovered by him against Perryman, and at the same time filed a bill in Equity, in order to get this equitable claim allowed as a set-off.

Pending this suit, in November, 1849, Hardy Durham, John Dennard and Thomas J. Perryman, filed their bill in Twiggs Superior Court, in the nature of a bill of review, setting out the foregoing facts, and praying a review and reversal of the decree rendered upon the original bill against Perryman. This bill alleged farther that, "at the time of the filing of the said bill, Perryman was not a citizen or resident of the State of Georgia, but had long before left said State, and removed to the State of Texas, and has never been in Georgia since, and that the complainants in the said bill, by themselves or their attorneys, with a full knowledge of the fact, directed or procured the Sheriff of Twiggs County to return on said bill, that he had served the same, by leaving a copy at the most notorious place of abode of said Perryman, in the County of Twiggs, when in fact, he had no such residence."

The grounds or reasons assigned for the review were, 1st. Because there was no service of the bill upon Perryman.

2d. Because the bill was taken *pro confesso*, and a decree taken at the second term.

3d. Because the decree does not follow the verdict.

The bill also prayed for an injunction to restrain Guerry from pleading the said decree, or in any manner using it against the suit of Dennard against him. This bill was sanctioned, and injunction granted by Judge *Warren*, who, in the order granting it, stated that "it was represented to him, that the Judge of the Southern Circuit was absent from the Circuit."

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2d. Because there is no equity apparent upon the face of the bill.

3d. Because there was no *petition*, supported by affidavit, previous to the sanction of the bill.

4th. Because of the *laches* and lapse of time before complainants applied for the aid of the Court.

At the same time, there was a motion "to dismiss the bill for improvident sanction," on the grounds, among others :

1st. Because the bill was sanctioned without the payment of costs of the former suit, and without giving bond and security for the eventual condemnation money and future costs.

2d. Because it is no where shown that the Judge of the Southern Circuit was absent from his Circuit at the time the bill was sanctioned.

The Court below overruled both the demurrer and the motion, and on this decision error has been assigned.

SCARBOROUGH (represented by B. HILL,) for plaintiff in error.

COLE and S. T. BAILEY, for defendant in error.

In 1841, James P. Guerry, in right of his wife, one of the children of Lowery, and as guardian for three of the minor children, and John Williams in right of his wife, and as guardian of another minor child, filed their bill, in Twiggs Superior Court, against Perryman, as administrator, for an account. At the trial term, there being no answer, the bill was taken, *pro confesso*, and a verdict was rendered by the Jury for \$2048 54, for each complainant. On this verdict, a judgment or decree was entered, in favor of Guerry individually, and as guardian for the three minors, for four times the said sum.

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At the same time, there was a motion "to dismiss the bill for improvident sanction," on the grounds, among others :

1st. Because the bill was sanctioned without the payment of costs of the former suit, and without giving bond and security for the eventual condemnation money and future costs.

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1st. That there is no allegation that the decree has been signed and enrolled, or performed, or bond and security given for its performance.

2d. Because there is no equity apparent upon the face of the bill.

3d. Because there was no *petition*, supported by affidavit, previous to the sanction of the bill.

4th. Because of the *laches* and lapse of time before complainants applied for the aid of the Court.

At the same time, there was a motion "to dismiss the bill for improvident sanction," on the grounds, among others :

1st. Because the bill was sanctioned without the payment of costs of the former suit, and without giving bond and security for the eventual condemnation money and future costs.

2d. Because it is no where shown that the Judge of the Southern Circuit was absent from his Circuit at the time the bill was sanctioned.

The Court below overruled both the demurrer and the motion, and on this decision error has been assigned.

SCARBOROUGH (represented by B. HILL,) for plaintiff in error.

COLE and S. T. BAILEY, for defendant in error.

Guerry and Wife *et al.* vs. Durham *et al.*

By the Court.—LUMPKIN, J. delivering the opinion.

James R. Lowery departed this life intestate, in the County of Twiggs, and letters of administration were granted upon his estate to Thomas J. Perryman, Hardy Durham being his security. In 1841, the heirs at law, to wit: James P. Guerry, in right of his wife, Mary Ann Guerry, formerly Mary Ann Lowery, and as the guardian of Frances R., Emeline and William R. Lowery, who were then minors; John Williams, in right of his wife, Lurany Williams, formerly Lurany Lowery, and as guardian of Eliza Lowery, another minor, filed their bill in Twiggs Superior Court, against the said Thomas J. Perryman, as administrator, to recover the several distributive shares of said estate, coming to each. At the second term of the Court, in April, 1842, a verdict was rendered for each of the complainants, for the sum of \$2048 64, with costs of suit, and a decree was entered thereon, in favor of James P. Guerry, in right of his wife and as guardian for the three minors whom he represented, for the aggregate sum of \$8,164 56, besides costs, to be levied of the *individual property* of Thomas J. Perryman. It seems that Williams, both in right of his wife and as guardian of his ward, withdrew from the suit.

A return of "no property" having been made on the *fi. fa.* at April Term, 1843, James P. Guerry, in right of his wife, and as guardian of Frances R. and William R. Lowery, and Bennett S. Battle in right of his wife, who in the meantime, had intermarried with Emeline Lowery, commenced an action at law against Hardy Durham, as the surety of Perryman on the administration bond, to recover the amount of the decree obtained against Perryman. On the trial in April, 1844, a judgment was rendered for the plaintiffs, for \$3,380 and costs, the defendant having proved the payment of large sums of money by Perryman to the distributees, and which had not been allowed in the former case. This judgment Durham has discharged.

Perryman transferred to Durham certain promissory notes, for his indemnity as his security, and amongst the rest, one on James P. Guerry, for \$950. This note was assigned by Dur-

ham to John Dennard. The note not being negotiable, an action was brought upon it in Sumter County, in the name of Perryman, the payee, for the use of Dennard, the holder. To this action Guerry pleaded as a set-off, the decree in his favor against Perryman, and filed his bill, praying to be allowed this equitable defence.

Hardy Durham, John Dennard and Thomas J. Perryman, now exhibit their bill for the purpose of vacating the original decree against Perryman, on the following grounds, namely: 1st. Because there was no service of the bill on Perryman.

2d. Because a decree was rendered on the bill at the *second* term, without answer and without notice to the defendant, without any appearance on his part, without calling on him to answer, and without any order taking the bill as confessed.

3d. Because the decree does not follow the verdict, neither is it authorized by it.

4th. Because said decree demanded satisfaction out of the individual property of Perryman, and not the assets of the estate of Lowery in his hands.

5th. Because Perryman, before leaving the State, had settled with the legatees, and paid them all or nearly all that he owed them, which was known to the complainants, but which he failed to prove, because the suit proceeded against him *ex parte*, and while he was in a foreign country.

6th. Because, whatever was due to the heirs of Lowery, had been adjudicated in the action at law upon the bond against Durham, the security, and the recovery had been fully satisfied.

7th. Because, in the returns of Perryman, there was a credit of upwards of \$11,000, to which he was entitled, but which was overlooked or disregarded by the Jury who tried the cause.

The bill prayed that James P. Guerry might be enjoined from pleading said decree in his favor, or in any other way using the same, to defeat the action against him in Sumter County, upon his note.

At October Term, 1850, of Twiggs Superior Court, a motion was made by the defendants, through their solicitor, to dismiss said bill "*for improvident sanction*;" and at the same time a demur-

rer was filed, embracing pretty much the same specifications which are contained in the motion. To avoid repetition, I will extract all the grounds which are set forth in both and consolidate them. They are, 1st. For want of equity. 2d. For multifariousness. 3d. Because there is no allegation in the bill that the original decree which is sought to be reversed, was signed and enrolled, performed, a bond and security given for its performance; nor is there any account of the inability of the party to do so.

4th. Because the bill operates as an injunction, when there is no evidence that the costs have been paid, or security given in terms of the law.

5th. Because there was no petition for leave to file the bill.

6th. Because the bill was sanctioned by the Judge of the South-western Circuit, when it does not appear that the Judge of the Southern Circuit in which it is pending, was absent from his Circuit at the time it was granted.

7th. Because complainants' remedy is lost by lapse of time.

8th. Because the ground upon which the complainants seek relief, so far as the new matter is concerned, existed long before the first finding.

9th. Because the bill is not restricted to the original subject matter of litigation, but seeks to introduce new matter, which is extrinsic and wholly irrelevant to the former issue.

10th. Because the bill is brought in part by Durham only, and the name of Perryman is only used collaterally.

I propose to examine, in the first place, whether or not there is any foundation for this bill. Are there any errors apparent upon the face of the proceedings, which would entitle the complainants to the relief which they seek? They complain of the amount of the decree, and insist that it does not follow the verdict. We do not so understand it. The verdict was for \$2048 64, for each of the complainants. Two of them, that is, Williams in right of his wife, and as guardian for one of the minors, discontinued their suit, and the decree was entered up \$8,194 56, in favor of the other four. It is, therefore, in strict conformity with the finding of the Jury.

[1.] Nor would there have been any irregularity in taking the bill as confessed, and proceeding to trial at the *second* term, provided it had been served, and the defendants had failed to answer.

That the order to make the money out of the *individual* property of Perryman, was manifestly wrong, we entertain no doubt. In *Jones vs. Robinson*, (*Dud. Rep.* 1,) the Judges in convention say that, "this practice has not the sanction of a single decision." But we are not prepared to hold that, upon this ground alone, a bill of review should have been sanctioned.

[2.] But the broad foundation for this proceeding is found in the fact that, the original bill under which the decree was rendered, which it is attempted to set aside, was never served. Upon this point the bill charges that, "at the time of the filing of the original bill against Perryman, the defendant was not a citizen or resident of the State of Georgia, but had long before left the same, and removed to the State of Texas, and has never returned since; or that the complainants, either by themselves or their attorneys, with a full knowledge of these facts, fraudulently directed and procured the Sheriff of Twiggs County to return on the bill, that he had served the same, by leaving a copy at the notorious place of abode of the defendant in the County of Twiggs, when in fact, he (Perryman) had no such residence." If this statement be true, and it is admitted to be so, both by the demurrer and the motion to dismiss, then the whole proceeding is a nullity, and the parties take nothing under it.

Is there anything in the manner in which this bill comes into Court, why it should not be sustained?

It is said to have been "*improvidently sanctioned.*" Judge Warren certifies that it was "*represented*" to him, that Judge Scarborough was absent from his Circuit, within which the bill is returnable. How represented, does not appear. We are bound to presume that it was upon the oath of the complainants, or upon other sufficient testimony.

[3.] Again, it is objected that no costs were paid, or security given. And it is admitted that the record furnishes no proof of these facts. But we apprehend that this omission is no

good reason for dismissing the bill. By the Act of 1811, (*New Dig.* 524,) no injunction could be granted until the party applying for the same had previously given to the party against whom the injunction was to operate, a bond with good and ample security, for the eventual condemnation money, together with all future costs.

[4.] But by the amendatory Act of 1842, (*ib.* 528,) the Judges of the Superior Courts of this State are authorized to grant injunctions, upon such security and under such terms, as in their discretion, the case may require.

Now, it does not appear that any security was necessary in the present instance. The complainants do not seek to restrain the collection of the original decree. All that is asked is, that Guerry may not be permitted to use it by way of defence to the suit which has been brought against him on his note, in Sumter County. All that the defendants could require, under any aspect of the circumstances, would be, to dismiss the injunction, unless security was given. We think this matter may be safely confided to the discretion of the Circuit Judge.

Finally, do the complainants come too late to be entitled to relief?

It is conceded that in England, a bill of review for errors apparent upon the face of the record, will not lie after the time when a writ of error could be brought, and that Courts of Equity govern themselves in this particular, by the analogy of the Common Law, in regard to writs of error. *Smith vs. Clay*, *Ambl. R.* 645 *S. C.* 3 *Bro. Ch. R.* by *Belt*, 639, note. *Mitf. Eq. Pl.* by *Jeremy*, 88. *Cooper's Eq. Pl.* 91, 93. *Wyatt's Pr. Reg.* 97, 98. *Lytton vs. Lytton*, 4 *Bro. Ch. R.* 441. *Kelly vs. Lennon*, 1 *Jones and Latouche R.* 305. And that there, where writs of error must be brought within twenty years after a judgment, unless in certain cases of disabilities, the like limitation is adopted in Courts of Equity as to bills of review, for errors apparent on the face of decrees. And that for the same reason, in the Courts of the United States, bills of review for errors apparent upon the face of decrees, are limited to five years, that being the limitation of

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writs of error upon judgment at Law. *Thomas vs. Harvies Hen-*
is, 10 *Wheat. R.* 146.

But in this State, until 1845, we had no writ of error, unless a writ of error *coram nobis*; if indeed, any such remedy was practicable under our Judiciary. But bills of review have always been entertained by our Courts. From the first organization of the State government, they have been considered in the nature of an application for a new trial in Equity. And as to the time within which they must be brought, as no analogy can be invoked from writs of error in this State, we see no alternative but to apply the Common Law rule of twenty years, after the judgment which is sought to be reviewed. I earnestly hope that the present Legislature may not adjourn, without providing the necessary remedy for this defect in our laws. Two or three years is quite long enough, provided the Statute contained the usual exception in favor of persons laboring under legal disabilities; such as minors, married women, insane persons, and those who are imprisoned on any criminal charge, or in execution for any criminal offence, &c.

The other points in this case, relate to matters of form rather than of substance, and are not, in our judgment, deserving of a more particular consideration, than the incidental notice which has been taken of them in the course of this discussion.

No. 3.—BENNETT S. BATTLE and others, plaintiffs in error, vs.
HARDY DURHAM and another, defendants in error.

[1.] Where a bill was filed by the *cestui que trusts*, against a trustee, for the execution of an express trust: *Held*, that to make the Statute of Limitations available on demurrer, as a bar, it must affirmatively appear on the face of the complainant's bill, that the period of time prescribed by the Statute had elapsed, from the time of the alleged conversion of the assets by the defendant, before the filing of the bill, to compel the execution of the trust.

Battle et al. vs. Durham and another.

In Equity, in Twiggs Superior Court. Decision on demurrer, by Judge HANSELL. October Term, 1851.

In 1836, James R. Lowery died, and Thomas J. Perryman became his administrator, giving Hardy Durham as the surety on his bond. In 1841, James G. Guerry, as the guardian of three of the minor children of Lowery, filed a bill for account and distribution against Perryman, and a decree was rendered thereon, at April Term, 1842, for each complainant, for \$2048 64.

In July, 1850, Bennett Battle, who married one of the minor children, and the other two children, filed their bill against Durham and Guerry, charging the foregoing facts; and farther, that Perryman removed from Georgia to Texas, taking with him all of his visible property; that about the time of his removal, he left a trunk (containing a large amount of *assets*, to wit: bills, bonds, promissory notes and other choses in action, titles to lands, &c. of great value, viz: of the value of eight thousand dollars, a portion or all of which, were the assets of Lowery's estate,) with one William R. Willis, with directions that the trunk and its contents should be placed in the possession of Hardy Durham, for the purpose of paying off the amount due to the complainants; that Willis delivered the trunk and contents, with the directions to said Durham, who received the same with notice of the purposes of the said Perryman, as aforesaid; that Durham refused to carry out these directions, but converted and appropriated the same to his own use; that complainants are ignorant of the precise character of the assets; and that the facts in relation to the receipt of the assets by Durham, have but recently come to their knowledge, since 1st January, 1850. The prayer was for an account.

To this bill, Hardy Durham demurred, on various grounds, and upon hearing argument, the Court below sustained the demurrer, on the ground that the claim of complainants was barred by the lapse of time and the Statute of Limitations.

This decision is assigned as error.

B. HILL, for plaintiff in error.

S. T. BAILEY, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The complainants allege in their bill, that the defendant received the assets contained in the trunk, for the purpose of paying the debt due by Perryman to them, the same being of the value of eight thousand dollars, and that the defendant, at the time he received the same, had *notice* of the purpose, for which the same were directed to be placed in his hands by Perryman. The complainants also allege, that the defendant has not paid their demand against Perryman out of the said assets, but has *converted* the same to his own use, &c. It is not stated by the complainants at what time the defendant refused to pay them, or at *what time he converted the assets to his own use.*

The defendant demurred to the bill, on the ground that the complainants' demand was barred by the Statute of Limitations.

The defendant held the assets placed in his hands, by the direction of Perryman, as a *trustee* for the payment of the complainants' demand, which a Court of Equity will compel him to execute. The defendant received the assets, *to be paid to the complainants*, and according to the ruling of this Court, in *Keaton vs. Greenwood*, (8th Georgia Rep. 102) it constituted an express, or direct trust. The argument for the defendant in error is, that the complainants allege, that the defendant *converted* the assets to his own use, and refused to pay their demand against Perryman, and therefore, the Statute of Limitations commenced to run from the time of such conversion, in favor of the defendant. However that may be, it is a sufficient answer to say, that it does not *affirmatively* appear on the face of the complainants' bill, that four years, or any other *definite* period of time, had elapsed, from the conversion of the assets, to the time of filing their bill in Court, for the execution of the trust.

In order for the Statute of Limitations to constitute a good defence on demurrer, it should have appeared on the face of

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the bill, that the period of time prescribed by the Statute had elapsed, from the time of the conversion of the assets by the defendant, before the filing of the bill in Court; *that fact* not appearing on the face of this bill, it is not necessary to consider the effect of the allegation, that the receipt of the assets by the defendant, was not known to the complainants, until January, 1850.

Let the judgment of the Court below be reversed.

No. 4.—BENJAMIN B. SMITH, plaintiff in error, *vs.* SAMUEL TAYLOR and Wife, defendants in error. LOUISA LYNCH, *vs.* The Same.

[1.] When the husband and wife are sued in the same action, for a tort of the wife, committed during the coverture: *Held*, that it is necessary that the wife be served with process; but if she appears and pleads to the merits, she waives her right to except to the want of service, and will be bound by a judgment rendered in the case against her.

Case for words, in Twiggs Superior Court. Decision by Judge HANSELL, October Term, 1851. Consolidated by consent.

The plaintiffs in error brought actions against Samuel Taylor and wife, for slanderous words. The cases came on to be tried, at October Term, 1851, and were submitted to a Jury, when counsel for defendants moved to arrest the causes and dismiss them, on the ground that Mrs. Sarah Taylor—one of the defendants—had not been served with a copy of the petition and process, and no return had been made as to her. Counsel for plaintiffs objected, and showed that Samuel Taylor, the husband, had been personally served; that both defendants had appeared by counsel, at the appearance term, and pleaded the

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general issue; that by counsel, they had acknowledged service on interrogatories, and had themselves sued out interrogatories and commissions thereon; and had from the commencement of the cases, proceeded to prepare them for trial, without having made any objection as to the service.

The Court sustained the motion and dismissed the cases, and this decision is assigned as error.

IVERSON L. HARRIS submitted the following points and authorities for plaintiff:

That service of the declaration and process on the wife, in personal actions in which she has been made a party, is unnecessary—service of the *husband alone* being sufficient. See *Statute of 12th Geo. I. ch. 29*, which requires personal service, and the decisions under it. 3 *Vol. Chitty Practice*, 262. Citing *Buncombe vs. Love and Wife*, Barnes 406. *Tidd's Supplement*, ed. of 1833, p. 74. 1 *Sellon*, p. 91. 3 *Tidd*, 3 *Amer. ed.* §169.

The decisions under the Statute of George are obligatory on this Court—they form a part of the Common Law brought to this State by Oglethorpe and his Colony, and have not been altered by the Legislature.

If the service on the husband alone, in this cause, was defective, it is too late to object, after having pleaded to the action, and when the cause is ready for trial. *Steel vs. Plower*, 22 *Eng. C. L. R.* 780.

C. B. COLE submitted for the defendant:

1. There can be no judgment without service on the defendants; that under our Judiciary Act of 1799, both defendants should have been served. *Prince's Digest*, 420. 5 *Geo. R.* 201.

2. When suit is brought against husband and wife, for a *tort* committed by her, the death of the husband does not abate the suit. 13 *Alabama R.* 127.

3. Judgment against husband and wife, may be enforced against the wife. *McQueen on Husband and Wife*, 39, 90. *Tidd's Prac-*

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tice, 9th edition, 1026. 8 *Barn. & Cress. R.* 1. 2 *Meson & Wel. R.* 847. 8 *Carr. & Payne R.* 316. 17 *Eng. Common Law R.* 21.

By the Court.—NISBET, J. delivering the opinion.

[1.] Upon principle, the wife ought to be served. For torts committed by the wife, not in the presence of her husband, and not by his coercion, they are jointly liable, and must be joined in the action. If there is a recovery, the judgment passes against both. If the wife has a separate estate, it may be taken in execution, and she may be, together with her husband, arrested on final process. If the husband dies pending the suit, it does not abate, but survives against her. These things being so, she has a personal interest in the suit, and ought to have her day in Court—to have that she ought to be warned to appear and answer. The law loathes a judgment without a hearing. Her interest may become antagonistic to that of her husband. He may collude with the plaintiff; he may have coerced her to commit the tort. If the husband dies pending the suit, the wife not being served, how can the suit proceed? The plaintiff must see to it, that she is served, at his peril. To protect the rights of the plaintiff, the Courts should require the service. If she is not served, and the husband dies, and the plaintiff proceeds to judgment against her, I cannot see but that the judgment would be a nullity. Our Statute of 1847, protects widows and *femes sole*, from arrest and imprisonment, on account of a debt or demand, arising upon any contract made, or entered into, by them. It seems not to embrace a judgment founded on a tort, and if it did, it does not relate to women under coverture. As to the liability of a woman covert, to respond to damages for a tort, by arrest, that act leaves her as it found her at Common Law. For these principles see 2 *Kent*, 149. *Reeves Dom. Relations*, 72. *Clancey on Husband and Wife*, 89, 90. 1 *Wils. R.* 149. *Tidd's Prac.* 1025, 1026. 6 *Moore R.* 128. 5 *Barn. and Ald.* 759. 2 *Stra.* 1167, 1237. 3 *Wils.* 124. *Tidd's*

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Prac. 193, '4. 2 *Meson & Wels.* 847. 13 *Ala. R.* 127. 8 *Barn. & Cres.* 1. 8 *Cor. & Payne*, 316. *Cobb's New Dig.* 392.

These principles warrant the conclusion that the wife ought to be served with process. Authority to the contrary was relied upon by *Mr. Harris*. The case he referred to in *Barnes' Reports* was not read to the Court, nor have I been able to procure it. The *dictum* from *Tidd*, which he relied upon, states the rule dispensing with service doubtfully; it is sustained in *Tidd*, by reference to the case in *Barnes*, and to *Pr. Reg.* 351, '5, '6, the latter of which references is not accessible, and neither of them very reliable. The *dictum* in *Tidd* is also found in *Chitty's General Practice*, sustained by the case in *Barnes* alone. Only one case was read from the American books, by the plaintiff in error, and that is to be found in 1 *Baily S. C. R.* 521. That case is not entitled to much consideration, as it barely states the judgment of the Court, without reasoning and without authority, except the elementary *dictum* in *Tidd*. Upon such authority we cannot hold that it is settled in the books, that it is not necessary to serve the wife; and if it were, we should be constrained to say that it is badly settled, upon principle.

Aside, however, from all authority, English or American, we think that this question is settled by our own Statute. By the *Judiciary Act of 1799*, all civil suits, cognizable in the Courts of Justice, shall be by petition, &c. to which petition, it is made the duty of the clerk to annex a process, which is directed to the Sheriff, requiring the defendant or defendants to be and appear at the Court to which the same is returnable; and which process the Act declares *shall be served on the defendant or defendants at least, &c. &c.* (*Prince* 420.) If the wife is a defendant to the suit, by this Act, she must be served with process; and that she is a party defendant, even with rights of defence, distinct from those of her husband, there is no doubt whatever.

The other question is, was not the want of service waived by the wife's appearing and answering to the merits? We think it was. Without service, the Court had no jurisdiction over *Mrs. Taylor*; but when she came in, not pleading to the jurisdiction, but to the merits, she is to be held as submitting to

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the jurisdiction, and would be bound by a judgment rendered against in her in the case. *Dearing et. al. vs. The Bank of Charleston*, 5 Geo. R. 319. *Picquet vs. Swan*, 5 Mason R. 35. 1 Denio, 91. The bill of exceptions states that *both* the defendants appeared by counsel, at the appearance term, and pleaded the general issue; by counsel, acknowledged service of interrogatories and sued out interrogatories and a commission thereon, and had from the commencement proceeded to prepare the case for trial, without having made any objection to the service. It is claimed that want of service cannot be waived in this case, because the Act of 1799 declares "that all process issued and returned in any other manner than that hereinbefore directed, shall be, and the same is hereby declared, to be null and void." The process in this case, duly issued according to the Act, and that we hold to be necessary, even in cases like this, where appearance waives the want of service. This is necessary that the record may be complete. The law declares that process *issued* in any manner different from that pointed out, shall be void. In this case it did not *issue* in any manner different from, but did issue according to the provisions of the Act. The Act also requires that it shall be *returned* in a certain way, and if issued and *returned* differently, it, that is, the process, shall be void. In this case there was no *return* of the process against the wife at all; therefore, there could be no return of it, in a manner different from that pointed out. There being no return of service, the wife came in and submitted to the jurisdiction, waiving her right to insist upon her want of service. I do not see that there is any thing in the Act of 1799 which forbids that.

Upon this last ground we remand the cause.

No. 5.—THOMAS S. CHAPPELL, administrator, &c. plaintiff in error, vs. L. CAUSEY, administrator, &c. and JESSE STALLINGS and wife, defendants in error.

- [1.] If a distributive share of an intestate's personal estate, accrue to a married woman during coverture, and the husband die before distribution is made, and without any act on his part reducing it to possession, it survives to the wife.
- [2.] H. died, leaving a widow and ten children, and a paper purporting to be his last will and testament. He bequeathed the whole of his estate to nine children. Upon the division, the husband of one of the daughters received two negroes, and after the death of the husband, the probate of the will was revoked, and an intestacy declared, on account of the insanity of the testator, and the two negroes were returned to the administrator: *Held*, that the possession of the negroes by the husband, was not such, under the law, as caused his marital rights to attach, but that the same belonged to the wife, by virtue of her survivorship.

In Equity, in Twiggs Superior Court. Tried before Judge HANSELL, October Term, 1851.

This was a bill filed by Littleberry L. Causey, as the administrator of James Hale, in the nature of a bill of interpleader, against Thomas S. Chappell, administrator of William W. Hodges, deceased, and Jesse Stallings and Mary Ann, his wife. The following facts appeared on the trial: William W. Hodges and Mary Ann Hale—the daughter of James Hale—were married in the year 1839, during the lifetime of the said Hale. James Hale died 25th Oct. 1847, leaving a paper purporting to be his last will and testament, which was admitted to probate by the Court of Ordinary of Crawford County, at Nov. Term, 1847. James C. Hale, the executor, qualified, and at January Term, 1848, of said Court of Ordinary, an order was passed, at the instance of the executor, appointing commissioners to distribute the estate among the several legatees; the distribution was made, and two negroes, Jane and Hannah, worth about \$800, were turned over to Wm. W. Hodges, who kept possession of them during his life, and at his death, in

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March, 1848, the negroes came into the possession of Thomas S. Chappell, his administrator, and were by him inventoried and appraised as the property of W. W. Hodges. The answer of Chappell stated, that this was done with the knowledge, approbation and consent of Mary Ann, the widow, who afterwards intermarried with Jesse Stallings. Afterwards, at May Term, 1848, of the said Court of Ordinary, the probate of the will of James Hale, was revoked and set aside, on the ground that the testator was not of sound and disposing mind; and letters of administration were granted to Causey some short time thereafter. Chappell, as the administrator of Hodges, under the advice of the Court of Ordinary, turned over to Causey, as the administrator of Hale, the two negroes, Jane and Hannah, who were sold by Causey—he still holding the purchase money.

The object of the bill filed by Causey, was to ascertain to whom the distributive share of Mary Ann Hale—then Hodges, now Stallings—should be paid; Chappell, as the administrator of Hodges, claiming that the marital rights attached to Jane and Hannah; and that as administrator, he was entitled to an amount equal to their value; Stallings and wife, claiming under the right of survivorship of the wife.

The Court below charged the Jury, that, “in his opinion, from the facts admitted, the defendants, Stallings and wife, were entitled to the funds put in litigation by the bill; and that Chappell, as the administrator of Hodges, was entitled to no part thereof.”

Chappell, as administrator of Hodges, excepted to this decision, and brings it to this Court for review.

SAMUEL HALL, for plaintiff in error.

C. B. COLE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

James Hale, of Crawford County, died in October, 1847, leaving a widow and ten children, and a paper purporting to be

his last will and testament, which was proven before the proper Court, in November thereafter; and James C. Hale, the son, qualified as executor. At the January Term of the Court of Ordinary next ensuing, commissioners were appointed to divide the estate among the nine legatees to whom it was bequeathed; the widow and one of the children having been excluded from all participation in the property of the deceased. In making the distribution, two negroes, Jane and Hannah, worth about \$800, were assigned to Wm. W. Hodges, who had intermarried, in 1839, with Mary Ann Hale, one of the daughters of the deceased. Upon the receipt of these negroes, Hodges made and returned a refunding bond to the executor, in terms of the law. Hodges departed this life in March, 1848, having kept possession of the property up to the time of his death, when it was turned over to Thomas S. Chappell, the administrator, with the knowledge, approbation and consent of Mary Ann Hodges, his widow; and the same was, by the said Chappell, inventoried and appraised as a part of the estate of Hodges.

Subsequently, to wit, at the May Term, 1848, of the Court of Ordinary, the probate of the paper purporting to be the last will and testament of James Hale, was revoked and set aside, and an intestacy upon the estate declared, upon the ground that the testator was not of sound and disposing mind and memory, when said instrument was made and published. In July, 1848, Littleberry B. Causey was duly appointed administrator generally, upon the estate of Hale. The legatees of Hale voluntarily surrendered up to Causey, the administrator, the property which they had received under the will; and Chappell, the administrator of Hodges, returned Jane and Hannah, under the order and direction of the Court of Ordinary of Twiggs County, to which he was answerable for his actings and doings upon the estate of Hodges.

These two slaves were sold by Causey, as a portion of the estate of the intestate, and the proceeds being in his hands, he filed his bill, on the Chancery side of the Court, for instruction as to whom it belongs: whether to Chappell, the administrator of Hodges, the former husband of Mary Ann Hale, or

to her, as survivor, and through her, to Jesse Stallings, the present husband?

The question then made by the record, is, were the slaves, Jane and Hannah, so reduced to possession by Hodges in his life time, as to cause his marital rights to attach? or does the interest in the estate of her father, survive to Mary Ann, the daughter?

[1.] We hold these two propositions to be incontrovertible: *First*, that the possession by the husband, in order to vest the property in him, must be *rightful*; and *secondly*, that the only rightful possession which could have been acquired to any portion of the estate of James Hale, was as *distributee*, through the administrator. If these positions be sound, and we entertain no doubt as to either of them, they would seem to be conclusive upon the rights of these parties. For the only possession of Hodges was that which he obtained under the will of Hale, which, with the probate thereon, were vacated and declared a nullity, on account of the insanity of the testator; and he died long before the estate of Hale was distributed by Causey, the administrator. Indeed, it is still in hand, *quoad* this controversy, to be disposed of under the decree of the Court, upon the conflicting claims which are set up to the fund.

[2.] We propose, however, to review briefly, some of the leading cases, as to what is a reduction into possession, by a husband, of a wife's *choses in action*, hoping thereby to satisfy the expectant himself, that the wife's right of survivorship in this property, should prevail over the claim which is preferred by the representatives of the former husband.

In *Clancey on Married Women*, 353, the father of a married woman had drawn a check on his banker, in favor of his daughter, for ten thousand pounds, which she presented at the banker's on the same day, and took from them a promissory note for the money, payable on demand, and then gave it to her husband. The husband afterwards applied to the bankers for one thousand pounds of the money, which was paid him, and he received the interest on the remaining nine thousand pounds during his life, but never was paid any more of the principal. He afterwards died

and left his wife surviving, and a bill was filed, praying that the nine thousand pounds might be declared to be a part of his personal estate. The wife, in her answer, insisted that it formed no part of his personal estate. It was held, that the note given to the wife by the banker, must be considered a *chose in action*, which survived to her.

In the case of *Bates vs. Dandy*, 2 *Alkyns*, 206, a brother died intestate, leaving three sisters, among whom his property was devisable. Dandy, the husband of one of the sisters, received two mortgages for one hundred and fifty pounds each, as the share of his wife, which he pledged to the plaintiff for two hundred pounds advanced to him, giving his promise to assign them. After his death, on a bill against his administrator and the mortgagors, to foreclose, Lord *Hardwicke* held, that this was but a disposition of the mortgages, *pro tanto*, and that after satisfying the plaintiff, whose equity he sustained, the mortgages belonged to the wife, as *her choses in action*.

In *Lodge vs. Hamilton*, 2 *Serg. & R.* 491, a recognizance, taken in the Orphan's Court, for the wife's share of the land, in the name of the husband and wife, was held, not to be such a reduction of the wife's property, which, by this process, had become personal, into possession, as to defeat her rights of survivorship. "No case," says the Chief Justice, in his opinion, "has been, or can be cited, where the wife surviving her husband, has been deprived of her choses in action, unless he had obtained the possession, or made some assignment or disposition of them in his life time, or stood in the light of a purchaser."

In *Elms vs. Hughes*, 3 *Dessau. Ch. Rep.* 155, 160, it is decided that if a husband possess himself, as executor or administrator of property, to which his wife is entitled to a distributive share, it is not a reduction into possession of the wife's interest, so as to vest it in him, and if he dies before actual division be made, she takes by survivorship.

The same doctrine is affirmed in *Wallace vs. Talliaferro*, 2 *Call. Rep.* 376. Thus it appears, that so strong are the guards which the Courts have thrown around this right, that even in cases where

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actual reduction into possession has taken place, if the possession can be referred to any other intent, than that of appropriating the property to the use of the husband, as such, the Courts preserve it to the wife.

But a case more directly in point, is that of *Schuyler vs. Hoyle*, 5 Johns. Ch. Rep. 196. Mrs. Schuyler was one of the heirs at law of Gewitt Fisher, who died intestate, abroad, leaving a large personal property. Schuyler, in right of his wife, with all the other distributees, joined in a power of attorney, to N. J. Bisscher, authorizing him to take out letters of administration upon the estate of the decedent, to collect the estate, and to pay over to each of them their respective portions. After Bisscher had obtained the letters, collected the funds, and actually paid over part to the husband, the latter died—a very large portion still remaining in the hands of N. J. Bisscher, the administrator. The wife of Schuyler claimed the balance as her property, by right of survivorship; and the heirs at law of Mr. Schuyler, claimed it as theirs, on the ground that the distributive share had vested absolutely in him. The question was argued at great length, and all the earlier English authorities cited. Chancellor *Kent*, after a full review of all the cases, said: “There remains no doubt, in my mind, that the wife was entitled, as survivor, to all that portion of her distributive share, which remained in the hands of the administrator of Mr. Fisher, at the time of her husband’s death.” He added, “we should act in contradiction to the whole course of decisions, if we were to consider the share of the wife, before it passed out of the hands of the administrator, as being reduced to the husband’s possession.”

A distinction was once supposed to exist between choses in action, accruing *before and during* coverture; and while it was admitted, that the rule was well settled as to rights of the former description, it was claimed that the latter, situated as this is, vested absolutely in the husband. But this distinction can neither be supported upon principle or by the adjudged cases.

Mr. Clancey, in his treatise on *Husband and Wife*, 4, says: “The choses in action, accruing to the wife during coverture, as well as those belonging to her at the time of the marriage,

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are the husband's property, only conditionally, that is, provided he reduce them into possession in his life time, and if he do not, and he should die first, then she would take them by survivorship :'' and in support of this position, see *Garforth vs. Bradley*, 2 Ves. Lim. 676. *Elliot vs. Collier*, 1 Wilson, 618. *Wildman vs. Wildman*, 9 Ves. 175. *Baker vs. Hall*, 12 Ves. 497. *Richards vs. Richards*, 2 Barn. & Adolph, 447. *Nash vs. Nash*, 2 Madd. R. 133. 1 *Dane's Abr.* 342, 344. *Deupree vs. Jackson*, 16 Mass. R. 480. *Deane vs. Richmond*, 5 Pick. Rep. 468.

It is well settled in England, that no distinction exists, as to the rights of survivorship by the wife, between those choses in action that accrue before, and those that accrue during coverture ; and the same doctrine is now distinctly recognized in New York, Pennsylvania, Virginia, South Carolina and most of the States of the Union. It has had the sanction of Lords *Hardwicke* and *Tenterden*, Chief Justice *Marshall*, Chancellor *Kent*, and many of the most eminent Jurists, at home and abroad.

But it is argued that, notwithstanding the revocation of the will in this case, that the division of the property, under it, will be ratified.

We cannot subscribe to this position. For many purposes, we admit that the acts done by an executor or administrator, *de facto*, in the due course of administration—such as the payment of debts, &c.—will be affirmed, notwithstanding, the authority under which the representative acted, is subsequently annulled ; but here are no innocent purchasers, whose title is sought to be disturbed. If so, Equity perhaps, would restrict the distributees to the proceeds of the property, in the hands of the trustee, and protect the *bona fide* purchaser. The contest is between legatees, who took under a will which has since been set aside and vacated, and the administrator. That the latter had the right to recover this property for distribution among the heirs at law, there cannot, in our minds, be a shadow of doubt.

We are asked whether a sale, by the administrator of Hodges, of Jane and Hannah, before the revocation of the will, would not have divested the estate of Hale of the title to this property ? Suffice it to say, that no such fact exists, and if it did, the ques-

tion of right would be the same, whether the administrator of Hale could follow the property itself, or had to look to the representative of Hodges for the proceeds. In no event could the estate of Hale, or Mrs. Stallings' right of survivorship be defeated.

It is suggested that the equity of this case is with the estate of Hodges; because, otherwise his children, who are the grandchildren of the ancestor from whom this property descends, will be entirely excluded from the inheritance. Admit this to be true, it goes to their mother, the daughter of Hale, to whom, by the laws of nature, it rightfully belongs. We never love equity more, than when in the full exercise of its paternal and most beneficent jurisdiction, it interposes to protect the rights of a *feme covert*, from the almost absolute power which the law gives the husband over the property of his wife. The contest here, is between the mother and her present husband, and the children of the former marriage; but the principle is the same if the issue had been between the widow as survivor, and the creditors of her bankrupt husband's estate, the same decree which would award this property to the children of Hodges, would sink the patrimony of Mary Ann Hale, under other circumstances, in the common vortex, to satisfy the debts of her insolvent husband's creditors.

But again: if Mary Ann Hale was advanced by her father, according to the custom of the country, when she intermarried with Hodges, then the first set of children get the whole of this, except the child's part going to their mother; and in this way, probably will receive more of Hale's estate, the common ancestor, than will the second set of children by Stallings—if, indeed, there be any.

In any view of this case, then, it seems to me that all the equity, as well as the law of it, is with Mrs. Stallings; and the Court are of opinion that the plaintiff in error has failed to sustain his exceptions, and that they must be disallowed.

Judgment affirmed.

No. 6.—THEODORE P. PEASE and others, plaintiffs in error, vs. ALEXANDER SCRANTON and others, administrators, &c. defendants in error.

[1.] A Court of Equity will not entertain jurisdiction for the purpose of enabling the creditors of an intestate to collect their demands from the administrators of such intestate, when the remedy at Law is ample and adequate; but will leave the parties to pursue their ordinary remedies, in the Common Law Court.

In Equity, in Glynn Superior Court. Decision on demurrer, by Judge H. R. JACKSON.

Theodore P. Pease and Horace B. Gould, in behalf of themselves and the other creditors of Mary Abbott, deceased, filed their bill in Equity, setting out the nature and amount of their claims; that the same had been put in suit, against Alexander Scranton and Horace B. Gould, as the administrators of Mary Abbott, deceased, which suits were still pending; that said Mary Abbott died possessed of considerable property, including real estate and slaves; that the wives of said Scranton and Gould, were the next of kin of Mary Abbott; that the administrators had failed and refused to make a perfect inventory, and have a full appraisement of the estate of Mary Abbott, not including therein, valuable real estate and numerous negroes—pretending that the same, under a marriage settlement with George Abbott, deceased, the husband of Mary Abbott, were the property of Mrs. Scranton and Mrs. Gould, at the death of Mary Abbott; that the administrators have pleaded "*plene administravit*," and "*plene administravit præter*" to the suits brought by complainants, and have paid to them a very inconsiderable amount of their claims, pretending that the estate is insolvent; that Mary Abbott, during her lifetime, mortgaged to Pease, the complainant, the tract of land now pretended not to belong to her estate; and that Pease is proceeding to foreclose the mortgage, which proceeding is still pending.

The prayer of the bill was, for an account; that if the admin-

istrators would not admit assets, that an account might be taken of the estate and effects of Mary Abbott, in whose soever hands the same may be found; that if necessary, a receiver may be appointed, to effect this object; that all legal, or other impediments to the recovery of complainant's demands, be removed, and for general relief.

To this bill, a demurrer was filed, on the ground that complainant had an adequate remedy at Law, and had elected to proceed in a Court of Law. The Court below, upon hearing argument, sustained the demurrer, and dismissed the bill.

Upon this decision, error is assigned.

HARDEN and LAWTON, for plaintiff in error, submitted the following points and authorities:

1st. It is not enough that there is a remedy at Law—it must be adequate and complete. 4 *Wash. C. C. R.* 349. 1 *Vesey*, 417. 10 *Johns.* 587. 17 *Johns.* 384. *Story's Eq. Pl.* §473. 1 *Story's Eq. Jur.* §80. And see 9 *Geo. R.* 393. 7 *Ib.* 553. 1 *Kelly*, 376.

A plea of *plene administravit*, puts the plaintiff to proof of assets; and on a judgment *quando*, only such assets as afterwards come to the hands of the administrator are liable. 3 *Kelly*, 132. 7 *Geo. R.* 149. 2 *N. & M.* 572.

Assets which can ordinarily be reached at Law, are such as come to the hands of the administrator *qua* administrator. 1 *Story's Eq. Jur.* §§551, '2. 2 *Wms. Ex'rs*, 1176, 1195, 1196.

That the remedy in Equity is more complete in cases of administration. See 1 *Story's Eq. Jur.* §§535, 541. *Adams on Equity*, 250. 8 *Geo. R.* 581, and cases cited. 3 *Kelly*, 575. *Story's Eq. Pl.* §§72 to 76, 172, 174, 178, 227. Especially is this true where the rights of third persons are involved, and an account is wanted.

The bill in this case, states expressly a refusal by the administrators to appraise or administer the particular assets, and that Scranton and Gowen, on pretence that the land and negroes did not belong to the intestate, "took possession of the same, un-

der some pretended claim of title in themselves individually, in *right of their wives*," the other defendants. It is clear, that whether the individual rights of Scranton and Gowen, real or pretended, would be concluded at Law, on a suit against them, only as administrators, until *devastavit* is established, certainly the rights of their wives could not be concluded in a proceeding to which they are strangers.

The estate is either solvent or insolvent. The bill avers its solvency—the demurrer admits a plea at Law of insolvency. If it be solvent, then a fraudulent impediment has been created by the defendants, one involving the determination of questions which cannot be settled by one suit at Law—if insolvent, then Equity is the proper tribunal to marshal the assets in favor of all the creditors. 1 *Story's Eq. Jur.* §§550 to 570, and to order an account.

The complainants are not bound to set out the title of the defendants minutely. *Story's Eq. Pl.* §255. 2 *Mad. Ch. Pr.* 168, '9. The prevention of a multiplicity of suits, is a distinct ground of Equity jurisdiction, and "a very favorite object" with Courts of Equity. 1 *Story's Eq. Jur.* §§64 *k.* to 67. 6 *Johas. Ch.* 151. And see 7 *Geo. R.* 549, 553. 2 *Ala.* 609.

2d. But it is said we have elected a legal forum, (and 2 *Kelly*, 153, has been referred to,) one adequate to give full relief, no discovery being wanted. This is not technically a bill for discovery, although every bill is more or less so. *Fonb. Eq.* 656, *note*. Had this been a bill of discovery, it would not have lain, until a denial of assets, at Law. 2 *Wms. on Ex'rs*, 1438. *Com. Dig. Ch.* (2 G. 3) (3 B. 2.)

Now, if we are not to anticipate a denial of assets, how have we elected? The *pendency* of a suit at Law has nothing to do with the question, and particularly before answer. *Story's Eq. Pl.* §742. 1 *Smith's Ch. Pr.* 561. 1 *U. S. Eq. Dig.* 420.

3d. In case of administration, it is not necessary that the complainants should be judgment creditors. *Story's Eq. Pl.* §§99, 100, 101. 1 *Story's Eq. Jur.* §§546, 547. 2 *Wms. Ex.* 1438, 1439. 6 *Johas. Ch.* 151. And a bill for account of the

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real estate *must* be brought on behalf of *all* the creditors. *Adams on Eq.* 257, 258.

The Court below decided, that no legal impediment was shown by the bill. But the bill should state *facts*, and not arguments, or presumptions of law. *Story's Eq. Pl.* §§23, 24, 240, 252. 8 *Geo. R.* 102.

But if the averments were not sufficiently distinct, as to the claims of the female defendants, the Court should have permitted an amendment. *Story's Eq. Pl.* §§883, 884, 885. 8 *Geo. R.* 522. 7 *Geo. R.* 457. The Court below was mistaken in supposing that these defendants were joined solely or chiefly as heirs at law. They were joined because of their supposed claim not in right of, but against, the title of the intestate, as is shown in the bill of complaint and the bill of exceptions.

Upon the subject of alleged multifariousness, we refer to 2 *Kelly*, 413. 5 *Geo. R.* 22, 573. 9 *Geo. R.* 278.

LLOYD and OWENS, for defendants in error, submitted the following points and authorities :

1st. The remedy at Law is full and adequate, by a traverse of the plea of *plene administravit*, and there is no allegation which shows the necessity of a resort to Equity.

2d. That even if the remedy in Equity is concurrent in this case, that the complainants having elected to proceed at Law, must exhaust their remedy there, before they can come into Equity.

3d. That the parties plaintiffs should have obtained their judgments at Law, to entitle them to join in a bill in a Court of Equity.

The remedy at Law is complete. If the property is in possession of the defendants, the matter can be tested by a traverse of the plea of *plene administravit*, which they have filed to the Common Law suit. 2 *Nott & McCord*, 574, 575.

If the property is not in possession of the defendants, it may be levied upon after plaintiffs obtain a judgment *quando acciderint*. 7 *Geo. R.* p. 149.

There is no special discovery sought for, no fact charged to be within the knowledge of defendants, no special reason for not continuing the suits at Law; and in such case the Court of Equity will not sustain the bill. 7 *Geo. R.* p. 207. 3 *Johnson Ch.* p. 58. See also, 7 *Geo. R.* 161. 3 *Kelly*, 137, 140.

Where remedies are concurrent, if the parties commence an action at Law, they cannot then file their bill in Equity, but are held to their election. 2 *Geo. R.* p. 151.

The creditor's bill, technically called, is sustained on the ground of discovery, and having once attached for that purpose, is continued for relief, to avoid multiplicity of suits. 4 *John. Ch.* 631. 1 *Story's Eq.* 516.

In this case, there is no discovery sought, and the bill of plaintiffs creates the multiplicity of suits which it is only sustained to avoid.

If the bill be a creditor's bill, seeking relief in full, then there are two suits pending for the same cause of action, and as this is apparent upon the face of the bill, it will be dismissed as oppressive.

If this be considered as a bill to set aside an obstacle in the way of the plaintiffs, in the recovery of their debts, they must first obtain a judgment at Law before they can unite. 6 *John. Ch.* 151.

By the Court.—WARNER, J. delivering the opinion.

The complainants filed their bill, as the creditors of Mary Abbott, deceased, against the defendants, as her administrators, asking the aid of a Court of Equity, to enable them to collect their demands against the intestate, from her legal representatives. For the purpose of giving to the Court jurisdiction, it is alleged, that the administrators have made an imperfect inventory of the intestate's property; that they have failed to include in such appraisement, valuable real and personal estate, consisting of lands and negroes; alleging that the same is, by virtue of certain deeds of marriage settlement, the separate property of the wives of the administrators, who are the daughters of the intes-

tate; that suit has been instituted in the Common Law Court, on their respective demands against the administrators, who have pleaded thereto, *plene administravit*, and *plene administravit præter*.

There is no allegation in the complainants' bill, which, in our judgment, makes it necessary for them to apply to a Court of Equity for relief. For aught that appears, their remedy at Law is ample and adequate. The question of title to the property, which is alleged to have been the intestate's at the time of her death, can be as well tried at Law, on the issue of *plene administravit*, as in a Court of Equity; at least, *no reason* is suggested by the bill, why it cannot. If the complainants should obtain judgments against the administrators, *quando acciderint*, the same might be levied on the property of the intestate which had not come to the hands of the administrators to be administered, as was ruled by this Court, in *Allen vs. Matthews*, 7 Ga. R. 149. If the property levied on by such judgment, should be claimed as not having been the property of the intestate at the time of her death, there does not appear to be any obstacle or obstruction, why the title to such property could not as well be tried at Law, as in a Court of Equity.

It is undoubtedly the policy of our State legislation, not to compel parties to litigate their rights in a Court of Equity, when the Common Law Courts afford them an ample, *adequate* remedy; and we have endeavored to conform to that policy, in the adjudications made by this Court. *Coleman vs. Freeman*, 3 Kelly, 137. *Powers vs. Gray*, 7 Ga. R. 206. If, in the prosecution of their legal rights, the aid of a Court of Equity shall be necessary to enable them to obtain them, the door of that Court is always open to afford the necessary assistance, upon a *proper case* being made; but until such a case is made, the parties must pursue their ordinary remedies in the Common Law Court.

Let the judgment of the Court below be affirmed.

No. 7.—ADAM SHORT and others, plaintiffs in error, vs. DAVID L. COHEN, defendant.

[1.] A party within the time, applies to the Clerk to enter an appeal, and gives bond with security, which is entered on the minutes, and in which it is recited that the costs are paid, and which minutes are approved and signed by the presiding Judge. The costs are not paid to the Clerk in hand, because, as he states, he is engaged with the business of the Court, and tells the party that he wishes to look at the papers, and consult the counsel for the opposite party, before making out the bill of costs, and will make it out as soon as possible. The Clerk testifies farther, that the costs were not tendered by the party, but that he has no reason to presume but that the costs would have been paid, if the bill had been tendered, and no demand for the costs was afterwards made upon the party appealing: *Held*, that the Statute requiring the cost to be paid before entering the appeal, was substantially complied with, and that the appeal was regularly entered.

Motion to dismiss an appeal, in Chatham Superior Court.
Decided by Judge H. R. JACKSON, June Term, 1851.

Two motions were made in this cause—one, to have the cause entered on the Appeal Docket, the other, to dismiss the appeal. Both were founded upon the same question, and involved the same, and a single point.

D. L. Cohen, against whom a decree was rendered, at January Term, 1851, in favor of Short and others, within four days after the adjournment of the Court, demanded an appeal. The usual bond, with security, was entered on the minutes of the Court, and attested by the Clerk, in which it was certified that the said Cohen "had paid all the costs." The motion to dismiss, was founded upon the allegation, that the costs were not actually paid. And in support of the motion, the affidavit of W. H. Bulloch, the Deputy Clerk, was tendered, stating that, "presuming the costs would be paid, and not being prepared with a bill of costs, as he was desirous to submit the bill to one of complainants' counsel, he attested the bond, which was drawn up in the usual form." No bill of costs was ever tendered to the appellant.

The Court below refused the motion, holding, 1st. That he would not go behind the minutes of the Court to inquire whether the costs were, or were not, actually paid. 2d. That the Clerk's own statement showed that the costs were not paid, for his own accommodation.

This decision is assigned as error.

LLOYD & OWENS, and CHARLTON, WARD & OWENS, for plaintiff in error.

LAW and BARTOW, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The appeal was certainly properly entered on the Appeal Docket. From the minutes of the Court, it appeared to the presiding Judge, that an appeal had been entered according to law. He was bound to recognize the appeal to be valid, so far as to place it upon the docket; particularly, as so placing it, would not preclude any rights which the plaintiffs in error might have, growing out of its alleged irregularity. For it was competent for them, notwithstanding its being entered on the docket, to move to dismiss it. This right to move for its dismissal, was in fact, reserved to them in the order of the Judge, directing it to be entered, and was exercised when the cause was called in its order.

The real question is this, to wit: was the Statute complied with in entering the appeal? If it was, there was no error in the order refusing the motion of the plaintiffs in error to dismiss it. Either party dissatisfied with the verdict of the Jury, may as matter of right, within four days after the adjournment of the Court, enter an appeal. The conditions precedent to the right of appeal are, that the person or persons applying, *shall pay all costs which may have arisen on the former trial*, and give security for the eventual condemnation money. *Cobb's New Dig.* 494, '95. The objection to the regularity of this appeal is, that the Statute was not complied with, because the costs were not paid. Coun-

sel insist, that before any appeal can be considered as regular, the cost must be paid. They claim that the Court has no jurisdiction of the cause on the appeal, until this is done; that payment of costs is made by law, an indispensable condition precedent to the right of appeal: and since the costs were not paid in this case, the party is not entitled to be heard on the appeal. To all of these propositions we yield our hearty assent, except one, and that is, that the Statute was not complied with, in the payment of the costs. It is true, that we are informed by the record, that the money was not literally paid into the hands of the Clerk; but it is also certified to us by the record, that enough was done, when the appeal was demanded of the Clerk, to amount to a substantial compliance with the requirement of the Statute in this regard. It is the duty of the Clerk to receive the appeal, when the cost is paid and bond is given, and to transfer the cause to the Appeal Docket. It is his official duty to take the security, and it is his official duty to receive the cost. He is a collecting officer to that extent. He is as much bound to collect the cost, as he is to do any other duty which the law devolves upon him; and he is not only not bound, but not at liberty to receive an appeal unless the costs are paid to him. When the costs are paid to him, he is liable for them to the persons to whom it belongs; and he may be coerced to pay it over, as any other receiving officer of the Court. Farther, when he receives the costs, the respondents are by that act discharged from liability to pay it. With these incontestable propositions borne in mind, let us look to the facts of this case. Within the time prescribed by law, indeed before the adjournment of the Court, the defendants in error appeared in Court, bringing with them their security. A bond with security was signed, sealed and delivered to the Clerk, and by him attested at the moment. In this bond the Clerk recites that the costs are paid. Subsequently, and before the minutes were approved and certified by the presiding Judge, it was entered on the minutes. The Clerk being engaged in the business of the Court, and being desirous, as he states, of examining the papers before making out a bill of the costs, and being also desirous of consulting one of the counsel for the plaintiff in

error, before making it out, attested the bond without receiving the cost, saying to the defendant, Mr. Cohen, that he would make out the bill of costs as soon as possible. No costs were tendered at the time; but the Clerk farther states, that he had no right to presume but that if he had tendered the bill of costs, it would have been paid. No bill of costs was ever presented to the appellants, and no demand of them for the costs was ever made. Subsequently, the bill of costs was paid by the counsel for the plaintiffs in error. These are the facts upon which the plaintiffs in error sought to dismiss this appeal. The Court refused to admit the proof of them, holding that he would not permit the record to be impeached by the Clerk, as to the fact of the payment of the costs, and holding farther, that the evidence would not, if admitted, authorize the dismissal of the appeal. Waiving the question as to the conclusiveness of the minutes, and the recital in the bond that the costs were paid, we declare our judgment to be, that according to the facts, as sought to be proved, the appeal was legally entered. The learned counsel for the plaintiffs in error "stay here upon their bond" and insist upon their pound of flesh, demanding, that if there be law in Venice, they shall have it. They say that the Statute requires the *cost to be paid in hand*, and the cost was not paid in hand. This is the argument, and the only argument; and to sustain it they need some authority—authority which goes the length of saying, that nothing short of actual, literal payment of the costs in money, will fulfil the conditions of the Statute. If in such a case as this, a Court of justice were held to deprive a party of a great right, by adhering to the mere letter of the Statute, then indeed would the administration of justice be justly characterised, as it most unjustly has been characterised, as a blind observance of absurd technicalities. We do not yield the point, that the law is so rigid in its exactions, or that the power of the Court to do justice, is thus narrowly limited. We are to consider the spirit and reasonable intentment of this Statute, and if these have been complied with, the defendants in error are entitled to their appeal. If the literal construction for which the counsel contend, was invoked in fur-

therance of justice, the invocation would be entitled to more favor. Here it is asked to the denial of the right of appeal in restriction of justice, when too, if granted, it would yield no right which is denied to the plaintiffs in error, and protect them from no injury that can by possibility result to them. They, we are very clear, could never be called upon rightfully to pay this cost ; and if they have merits in their suit, the presumption of law and fact is, that a rehearing will not deprive them of those merits. But if the appellants have merits in their defence, and their appeal is disallowed, they are forever concluded.

The receiving of the appeal, manifested by taking the bond, receipting for the costs, and entering on the minutes of the Court, was an official act, and imports, *prima facie*, that the requirements of the Statute were all complied with. Let it be conceded that these things may be inquired into ; that it was competent to remove the *prima facie* import of the recital in the bond, that the cost was paid, by proof that it was not paid, *then* how stands the case? The proof shows two things. 1st. That in legal effect, it was paid, and 2d. That it was the act of the Clerk, and not of the defendants in error, which caused it not to be literally paid. The defendants in error were there, ready and willing to pay, and from aught that appears, would have paid the cost, had not the Clerk himself volunteered to decline receiving it, in order to get time to make out the bill. The Clerk does not say, in so many words, that he declined receiving it, but such was the effect of both his words and actions ; for he says, that he did not tender a bill of the costs, and told the party that he would make it out as soon as possible. Had the Clerk, or any one for him, within the four days, tendered to the defendants the bill of costs, and they had failed to pay it, the case would have been very different. There is, however, no evidence that it was tendered to them, or that they had any opportunity to pay it. The Clerk having virtually asked time to make out the bill, they could not have been in laches until called upon to pay. Under these circumstances, are they not to be considered as having, on their part, complied with the law? The meaning of the Statute is, that a party shall not have the benefit of an appeal, if he

neglects or refuses to pay the costs. It certainly does not mean that he shall be deprived of the right of appeal, by the neglect or omission of the officer. Had these defendants taken the money from their purses, and tendered the amount of the costs, and it had been declined by the Clerk, can there be a doubt but that then their appeal ought to be sustained? The case made is, in substance, the same. They were there for the express purpose of entering an appeal, and the Clerk testifies that he had no right to presume but that they would have paid the cost, if he had tendered the bill. What was the legal effect of his conduct? It was, to become himself chargeable with it, to the other officers to whom it was due. Not to pass the amount to the account of the defendants with him, but to recognize it as paid, and to assume its payment to the officers; and thus we say, to all legal intents, the cost was paid, and the Statute complied with. Upon this view of it, how are the plaintiffs injured? The requirement that the cost shall be paid, is unquestionably for their benefit. If it was paid, they get the benefit. I have no idea at all, that under the facts disclosed in this record, they could be made liable for the cost due, when this appeal was entered. Is it objected, that upon this view of the matter, the officers are constrained to risk the solvency of the Clerk for their costs? The reply is, that they take that risk, as well, when the money is literally paid to him. He is by law, the receiving officer of this fund. Under the facts of this case, he is as clearly liable to be ruled for the costs, as if he had received it in hand. It does not alter the case, that counsel for plaintiff in error paid this cost, since they paid it in their own money.

Let the judgment be affirmed.

No. 8.—ABRAHAM HARMAN and another, executors, &c. of Shadrach Winkler, deceased, plaintiffs in error, vs. R. A. ALLEN & Co. defendants.

[1.] A lessee of steam saw mills is neither *agent* nor *superintendent*, in contemplation of the Act of 1842. He may create a lien on the property for services rendered, or for supplies furnished the mills, during his occupancy, to the extent of his unexpired term, but no further. The tenant cannot, by his contracts, encumber the reversion.

Claim, in Chatham Superior Court. Decision by Judge H. R. JACKSON, June 2d, 1851.

This was an application for summary process, under the Acts of December 11th, 1841, December 17th, 1842, December 24th, 1847, (*New Digest*, 428)—to enforce the lien of R. A. Allen & Co. upon the Savannah steam saw mill, for timber furnished said mill. The affidavit stated, that Abram Harman and Zachariah Winkler, as executors of Shadrach Winkler, were the owners of the mill, and that Amos Webb was their agent, to whom the timber was delivered. Harman and Winkler, as executors, interposed a claim to the property, and upon the trial of this claim, the Jury found a special verdict; among other things, they found, "that at the time said judgment was obtained, one Amos Webb was the lessee of said mill; and that the freehold of the same belonged to the claimants, as executors of Shadrach Winkler; that the debt for which the said judgment and execution were obtained, was contracted by the said Webb, the lessee of the mill, while the same was in his exclusive possession, custody and control; and that the said executors had no interest with, nor relation to the said debt, but that the same was contracted by the said Webb, for his own use and benefit, he being in possession of said mill, and exclusively running the same; and the said supplies being furnished, while the mill was thus in his possession."

Upon the facts thus found, the presiding Judge held, that the

property was subject to the execution, under the acts before referred to.

Upon this decision error has been assigned.

CHARLTON, WARD & OWENS, for plaintiff in error.

LAW and BARTOW, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

This writ of error is sued out to reverse a judgment of the Circuit Court, awarded on a special verdict. From the facts found by the Jury, it seems that the Savannah steam saw mills, owned by the estate of Shadrach Winkler, deceased, were leased to one Amos Webb. During the term, the lessee contracted a debt with Robert A. Allen & Co. for timber furnished for the use of said mills, amounting to \$688 44. Webb failing to pay the account when demanded, the creditors applied for, and obtained an execution, under the lien laws of this State, and caused it to be levied on property "*attached to and forming a part of said mills.*" The executors of Winkler resist the proceeding, on the ground that the freehold is not liable for the contracts of the tenant, made as this was, for his exclusive use and benefit, and in which the proprietors of the fee, had no interest whatever.

The lien given by the Act of 1842, and the summary remedy provided for its enforcement, (*New Digest*, 428,) are in behalf of the persons who are employed by the "owner, agent or superintendent of the mills;" or for services rendered, or for supplies of any description, which may be furnished such steam mill.

It is clear that a lessee is neither *agent* nor *superintendent*, in contemplation of the Statute. He must therefore be the owner of the property, or otherwise the Act does not apply to him at all. But he is the qualified owner of the mills; and it was competent for him, as such, to bind the property for the unexpired term for which it was let. Beyond this he could not go.

It would be intolerable to hold, that he could create liens

upon the reversion, *ad libitum*, for stocks and other materials consumed during his temporary occupancy.

It has been contended that the words *agent and superintendent* include those who, *de facto*, control the property, irrespective of the ownership. If so, then, a mere trespasser or disseizor, who wrongfully obtains the custody, might encumber the estate with the most ruinous burdens. Such we apprehend, could not have been the intention of the Legislature. None but the rightful owner, his agent or superintendent, can exercise this power; and inasmuch as the tenant, for the time being, is the rightful owner, he may, by his contracts, bind the property to the extent of his interest, but no further.

The judgment must therefore be reversed.

No. 9.—WM. B. GAULDEN and others, plaintiffs in error, vs.
THE STATE OF GEORGIA, defendant.

[1.] Where a Solicitor General in this State has, during his term of office, instituted a prosecution against a defendant, by preferring a bill of indictment against him for a violation of the law, public policy forbids that he should be allowed, after the expiration of his term of office, to be employed as counsel for such defendant, on his trial for the offence charged in such indictment.

Motion, in Bryan Superior Court. Decision by Judge H. R. JACKSON, December Term, 1851.

The case of the State vs. James Cody and Patrick Cody, for a misdemeanor, being called up for trial, Wm. B. Gaulden appeared as one of the counsel for defendants, and requested his name to be marked on the docket; when counsel for the State objected, upon the ground that said Gaulden, at the previous April Term, (being then the Solicitor General of the district),

drafted the indictment upon which the issue for trial was formed ; that he consulted with the assistant counsel, and was cognizant of the facts of the case. It also appeared that the Solicitor General's fee for drawing the indictment had been allowed by the Court, but had not been paid out of the fines and forfeitures, as authorized by law, there not being any fund in hand for that purpose.

Upon argument, the Court below excluded Mr. Gaulden from appearing as counsel.

This decision is assigned as error.

WM. B. GAULDEN and WM. B. FLEMING, for plaintiff.

JNO. OWENS, for defendant in error.

WM. B. GAULDEN, for plaintiff in error, submits the following note of the points and questions to be made :

The election of Solicitor General to office, is in the nature of a contract.

The termination of the term for which the party was elected, is a termination of the contract, and the parties are remitted to their original positions.

In this case, the term of office had expired, and a successor elected and qualified. 2d. There is no analogy between the relations of a Solicitor General and the State, and the relations of any ordinary counsel and client. But if there was a client who employs counsel to perform specific duties up to a certain point, and then discharges him, releases the counsel from all obligation not to be employed against him in that case. In this case, I had been discharged by the State.

3d. I could have known nothing of the facts of the case, except as I derived them from counsel ; this was mere hearsay and not remembered by me five minutes after.

4th. This indictment was found on presentment of a Grand Jury ; the law made it the duty of the Solicitor General to draft this indictment. *Prince's Digest*, 659. The Constitution of the

United States, *Prince*, 900. Constitution of Georgia, page 911, *Prince's Digest*. No compensation was ever received for drawing the indictment.

By the Court.—WARNER, J. delivering the opinion.

[1.] The question made in this case is, whether a Solicitor General who, in his official capacity, has drawn an indictment against a defendant or defendants, and prosecuted the same, as counsel for the State, can be permitted, after the expiration of his term of office, to take a fee from the defendant or defendants, in such indictment, and appear as his or their counsel, for the purpose of defending him or them, on the trial, for the accusation contained therein? The practice in most of the Circuits of this State, so far as we know or believe, has heretofore uniformly been, to allow the Solicitor General to appear as counsel for the defendants against whom bills of indictment had been preferred during his term of office. In this case, the former Solicitor General has only done what has heretofore been the general practice in most of our Circuit Courts; but upon what principle this practice has been allowed to prevail, we are not advised. The question has, however, now been presented for our consideration and judgment, and we are bound to decide it according to our views of right and public policy. It is urged in behalf of the former Solicitor General, that in his official capacity, he must be considered as standing indifferent between the people of the State and the defendant who is indicted; that when his successor has been elected and qualified, the State is to be considered as having *discharged* him from her service, and therefore, he is at liberty to appear as counsel for the defendants whom he prosecuted while in office. Admitting, that in his *official* capacity, he is supposed to stand indifferent, so far as his personal feelings are concerned, yet, he is not the less the counsel for the State on that account, and must necessarily become familiar with the facts of the case upon which the State relies for a successful prosecution of the indictment. His position, as the counsel for the State, enables him to learn the difficulties which may stand in

the way of the conviction of one who is really guilty, which no other person would be as likely to know, for the reason, that his communication with the prosecutor, the witnesses, and the Grand Jury, afford him the means of ascertaining many facts, which only those who are *officially* connected with the government, can know. Shall he be permitted to make use of the privilege thus officially conferred upon him, while in the discharge of his duties as counsel for the State, for the purpose of defending those who have been accused of crime during his official term of office, and that, too, for a reward paid by them to him, for such service?

Neither can the Solicitor General, on the expiration of his term of office, properly be considered as having been *discharged* by the State. The contract between him and the State is, that he will perform certain duties enjoined by law, for a specified term of time, for a stipulated compensation. Upon the expiration of the period of time for which he was elected, he is out of office, by the *express terms of the contract*. The State does not discharge him, but his term of service expires, by the express stipulation of the contract made between himself and the State; and hence, the want of any analogy between such a contract and a contract with a private citizen for professional services, who discharges his counsel from his case before the termination of the suit in which he is employed. The administration of the law should be free from all temptation and suspicion, so far as human agency is capable of accomplishing that object; and in our judgment, *public policy* most emphatically demands, that a Solicitor General who has been employed by the State, to prosecute defendants for a violation of her laws, for the compensation affixed by law, should not be allowed to defend such defendants from the charge contained in the indictment, after the expiration of his term of office, for a compensation to be paid by them for that purpose. Such a practice will have a tendency to greatly embarrass the administration of the Criminal Law; for, as the term of the office of Solicitor General is about to expire, prosecutors and others, who may be intrusted to prosecute offenders, will necessarily be restrained from communicating

freely with the State's counsel, when he may be employed at the next term of the Court, to defend the indicted culprit. It is no sufficient answer to say, that the law will not allow him to disclose any fact which may have been communicated to him, as the counsel for the State, to her prejudice. If he *knows* the vulnerable points in the case, derived by his official connexion with it, there are many ways by which those points might be made available to the defendant on his trial, by his counsel, besides disclosing them as a witness. If he has knowledge of facts, derived from his official connexion with the prosecution, which will operate to the prejudice of the State, and he is permitted to act as counsel for the defendant, that knowledge will be made available in the defence; therefore, we place our judgment on the ground, that public policy forbids that a Solicitor General who has prosecuted a defendant for a violation of the law, by preferring an indictment against him, should appear as his counsel to defend him from the charge, after the expiration of his term of office. We take pleasure in stating, that in the present instance the plaintiff in error has only pursued the general practice which has heretofore prevailed in most of the Circuits of this State, and that no positive abuse of his professional confidence has been made to appear, and none is imputed to him in this case, by the judgment which we have felt it to be our duty to award; but we affirm the judgment of the Court below, as before stated, on the ground of public policy, irrespective of the particular facts of this case.



. . .
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT COLUMBUS,
JANUARY TERM, 1852.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 10.—GEORGE W. COOK, plaintiff in error, *vs.* THE STATE
OF GEORGIA, defendant.

- [1.] If the indictment sets out the offence, in the language of the Penal Code creating it, or so plainly and distinctly that the Jury can clearly understand the nature of the offence, it is sufficient.
- [2.] If a married man have criminal intercourse with his own daughter, she being a single woman, he is guilty of incestuous adultery, and she of incestuous fornication.
- [3.] An indictment charges the offence to have been committed on a day certain, *and on divers days, before and after that time*: *Held*, that the words, *on divers days, &c.* may be rejected as surplusage.
- [4.] The offence may be charged to have been committed on any day previous to the finding of the bill, and may be proven at any time, within the term of limitation.
- [5.] The presiding Judge, upon determining certain motions to quash an indictment, said, that he had doubts about the law, and having such doubts, he would give the State the benefit of them; because the State was not allowed to carry the case to the Supreme Court: *Held*, that this remark was neither an error nor an irregularity.

Cook *vs.* The State of Georgia.

[6] In prosecutions for bigamy, adultery or incestuous adultery : *Held*, that the admissions of the defendant, as to the fact of his marriage, are admissible in evidence, and that it is not necessary to prove a marriage in fact.

Indictment for incestuous adultery, in Marion Superior Court. Tried before Judge IVERSON, September Term, 1851.

The indictment in this case alleged, that "George W. Cook, being a married man, in the County and State aforesaid, on the first day of May, in the year 1851, and on divers other days and times, before and after that day, did, then and there (and on said other days and times) commit divers acts of incestuous adultery, by cohabiting and having sexual intercourse with one Lucinda Cook, an unmarried woman; she the said Lucinda Cook, being then and there, the daughter of him, the said George W. Cook, contrary to the laws," &c.

On the trial, defendant's counsel moved to quash the indictment. 1st. Because it did not aver that Lucinda Cook was the legitimate daughter, of the whole blood, of the defendant, by her mother, to whom he was legally married.

2d. Because it alleges, "divers other times, before, &c." when it should aver and be confined to a particular date.

The Court overruled the motion, saying that he had doubts upon the question, and having such doubts, he would give the State the benefit of them; because the State was not allowed to carry the case to the Supreme Court. To this decision defendant excepted.

The State proposed to prove by defendant's admissions, that Lucinda Cook was his daughter, and that her mother was his lawful wife, to whom he had been legally married. Defendant's counsel objected, and insisted that the marriage should be proved by the record of the license and return thereon; and the mother identified by witnesses who were present at the marriage; and that neither proof of cohabitation, reputation or confessions, nor all combined, are admissible, without proof of the marriage in fact; and that the alleged daughter is the legitimate offspring of such marriage.

The Court overruled the objection and admitted the evidence, and defendant's counsel excepted.

Counsel for defendant requested the Court to charge the Jury, that the law was as insisted on by counsel, as to the proof of marriage, &c. The Court refused so to charge, and defendant excepted.

On these exceptions error is assigned.

A. MORTON, for plaintiff in error.

Sol. Gen. WILLIAMS, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The indictment in this case was sought to be quashed, upon the ground "that it does not aver that *Lucinda Cook* was the legitimate daughter, of the whole blood, of the defendant, by her mother, to whom he was legally married." The motion to quash, was, as we believe, properly overruled by the presiding Judge. The rule of this Court, as to setting out the offence, is well settled: it is the rule which the Legislature has prescribed. If the indictment charges the offence in the language of the Code creating it, or so plainly and distinctly, that the Jury can clearly understand its nature, we hold it sufficient. The offence charged in this indictment is *incestuous adultery*. The Penal Code simply declares, that if any person shall commit incestuous fornication or adultery, such person so offending, shall, on conviction, be punished by imprisonment and labor, &c. The indictment avers that the defendant, being a married man, did, on the first day of May, 1851, and on divers other days, before and after that day, commit divers acts of incestuous adultery, by cohabiting and having sexual intercourse with one *Lucinda Cook*, an unmarried woman—she, the said *Lucinda Cook*, being then and there, the daughter of him, the said *George W. Cook*—contrary to the laws, &c. I do not see but that this description of the offence is quite sufficient to enable the Jury to understand the nature of it. They, as sensible, although unprofessional men, could not fail to see that they were

impaneled to try *George W. Cook* for the offence of *incestuous adultery*. They could not mistake it for any other offence. The charges are that he was, on a day named, guilty, not of adultery, but *incestuous* adultery, by having *sexual intercourse with Lucinda Cook*, being then and there, his own daughter; and that he was a married man.

What constitutes the crime of incestuous adultery? What are its elements? Marriage of the defendant, the fact of sexual intercourse, and the relation of the parties within the Levitical degrees: all of which are averred, and so plainly as to be issuable—so plainly, that the Jury are obliged to understand, that they are to find all the issues against the defendant, before they can find him guilty.

[2.] Another exception to the indictment was, that the facts charged make a case of incestuous *fornication*, and no conviction, therefore, could be had on it for incestuous *adultery*. Here the defendant is charged to be a married man, and the woman an unmarried female. The exception goes upon the idea that the crime of adultery is not complete, unless both parties are married. Such is not the law. If both are married, the connection would be adulterous as to both. Since one is married in this case, to wit, the defendant, his crime is incestuous adultery. The woman being unmarried, her crime is incestuous fornication. 1 *Yeates*, 6. 2 *Dall.* 124.

[3.] Again, the indictment was sought to be quashed, on the ground that it does not charge the offence to have been committed on a particular day. It is, no doubt, claimed to be uncertain, because, after charging the offence to have been committed, on a day certain, to wit, the *1st day of May, 1851*, it proceeds to say, *and on divers other days and times, before and after that day*. These words may be rejected as surplusage, a day certain having been charged. See 2 *Mason's R.* 140. 1 *Starkie's Crim. Ple.* 235. *Rose vs. Redman*, 2 *Leach C. C.* 536. 1 *Ibid*, 127. Rejecting them, *time* is averred with sufficient certainty.

[4.] Any day previous to the finding of the indictment will do, except when time enters into the nature of the offence; and the offence may be proven on any day, within the period of

Limitations, dating back from the finding of the bill. 4 *Geo. R.* 341. 1 *Chitty's C. L. side page*, 224, '5. 1 *Stewart & Porter*, 208. 1 *Tyler*, 295.

[5.] When the presiding Judge determined upon these motions to quash the indictment, he remarked that he had doubts about the law, and having such doubts, he would give the State the benefit of them; because the State was not allowed to carry the case to the Supreme Court. Counsel for the defendant below have brought this *remark* here as error. This remark is no ruling; it is the expression of a reason for ruling as he did against the plaintiff in error. We are not disposed to treat it as an irregularity to be censured, much less as an error to be corrected. It is to be feared, in these days of reform, that the Judges will be so strictly laced, as to lose all power of vigorous and healthful action. I have but little fear of judicial power in Georgia so aggrandizing itself, as to endanger any of the powers of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the Jury of their appropriate functions. The danger rather to be dreaded is making the Judges men of straw, and thus stripping the Courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law. I am not, therefore, disposed to watch with great vigilance every act, phrase or sentiment, that may fall from the Court, with the hope of detecting an indiscretion, or fabricating an error. Surely some discretion ought to be allowed to able, pains-taking, conscientious men, as to the *mere etiquette* of judicial procedure. We are not inclined to regard this as an indiscretion, even, of which the plaintiff in error has any right to complain; because, instead of prejudicing his rights before the Jury, it would seem rather to be calculated to incline them towards acquittal; that is to say, if such a remark, made in the hearing of the Jury, could have any effect at all, upon the mind of a conscientious Juror, which I seriously question, it would incline him, if he was not fully satisfied of his guilt, to acquit one, against whom the law had been ruled thus doubtingly. But what principle is violated in the remark? The reason given,

for affording to the State the benefit of the Judge's doubts, is a true one. The State, in criminal cases, cannot take the cause up; the defendant can. It was said in the argument, that the great and humane principle of the Common Law, that if there is reasonable doubt as to guilt, the prisoner shall be acquitted, was violated. We recognize this just and benevolent rule of conduct, as applicable to Jurors, when called upon to pronounce upon guilt or innocence. Nay, more; we hold that no just Judge will, or ought to be permitted, to rule a principle of law against any man, either in criminal or civil causes, against his paramount convictions. A Judge who would do this, is worthy of impeachment. But a Judge may doubt, whilst he gives judgment, with a preponderance of intellectual evidence in favor of his decision. Perfect assurance that he is right, cannot always be had. Decide the law he must—he has no volition in the matter. With doubt, or without doubt, it is his duty to decide every question of law which properly arises in a cause; and if he decides honestly, with the best energy of his intellect—with the best industry of his circumstances—and the best lights of his conscience—he is amenable to no tribunal, human or divine, for the error of his judgment. Is it expected that Judges are always to decide without doubt? If it is, it is a vain expectation. There are times when the ablest doubt, and good men and able Judges doubt oftener than the weak and unconscientious. “Fools rush in where Angels fear to tread!” One of the ablest, most conscientious, and most renowned of English Chancellors, Lord *Eldon*, was called the doubting Judge; yet, a great living Jurist has said of him, that his mind was never perplexed, but by the fear of doing injustice. And is it to be conceded that in criminal cases, a Judge must decide in favor of the prisoner, in all cases where he has doubts? I know of no such rule of judicial conduct. He ought not to decide in any case, but according to his convictions. If he has no doubts, very well. If he has doubts, but his convictions, notwithstanding, are against the prisoner, let him decide according to his convictions. Such, we consider to have been the position of Judge *Iverson*, in this case. We have no right to conclude

that the weight of his convictions was in favor of the prisoner, and that, notwithstanding this, he decided against him, because *he* could take the case up, and *the State* could not. We dare not presume such official depravity. The record warrants no such presumption; nor does any thing in the personal or official character of the man warrant it. The record and all other things, warrant this, to wit, that his convictions as to the law, were against the prisoner, but that he was not so clear, as to be without doubt; and in such a state of the matter, he would give to the State the benefit of his doubt. And in all this we find nothing wrong. 9 *Martin's R.* 355. *Ayliffe's Pand.* 6 2 t. 17. *Coke Lit.* 291. 2 *Inst.* 422. 2 *Dall. R.* 160. 1 *Yeates' R.* 443. *Nott & McCord*, 168. 5 *Johns. R.* 296, *top page*.

[6.] The Court admitted the admissions of the defendant, that the girl with whom he had the incestuous connection, was his daughter, and that her mother was his lawful wife. The admission of this evidence is excepted to. This question is not without difficulty. It may be considered doubtful, both upon principle and authority. Acknowledgments, co-habitation and repute, &c. in ordinary civil cases, prove marriage; but, it is said, in criminal cases—as in prosecutions for bigamy and adultery—a marriage in fact must be proved. Upon like principles, it is insisted that in this case—a prosecution for incestuous adultery—a marriage *in fact* must be proven; and that the admissions of the defendant are not competent. As a general rule, the confessions of a party, freely and solemnly made, are the highest evidence. So reasonable and well settled is this rule, that exceptions to it, to be sustained, ought to rest upon the most unassailable grounds. It is argued that a man ought not to be convicted upon confessions of a fact, which he may have been induced to make contrary to the truth, with the view of protecting himself from a criminal prosecution. That is, in this case, the admissions of the defendant, that he was married, may have been made with a view to prevent a prosecution for living in a state of adultery with his alleged wife, and therefore ought not to be admitted. If the admissions of this defendant were made after his connection with his daughter, he must be pre-

sumed to have made them with a knowledge of the fact that he was liable to prosecution for incestuous adultery, and also with a knowledge, that upon the trial of such a prosecution, it would be necessary to prove his marriage. In that event, his admissions are to be taken to be true, because made against his interest. If made *before* such connection, it can only be presumed that he made them contrary to the truth, in order to shield himself from a prosecution for adultery, upon the assumption that he was, in fact, living in a state of adultery. Such assumption, a Court has no right to make. He is, I think, rather to be presumed to have spoken truly; and upon his trial, if he spoke under a misapprehension, and was not lawfully married, he might defend, by showing that fact. Upon principle, we see no reason why this evidence should not go to the Jury, to be weighed by them, and respected in their verdict, for what it is worth, under all the circumstances of the case.

But one case was read directly applicable to the facts of this case. No more could be found; because, crimes of such revolting atrocity as incestuous adultery, to the credit of humanity, are exceedingly rare. The principle upon which the admissions are claimed to be excluded, is drawn mainly from the analogous cases of *bigamy, adultery and crim. con.* The first and the main English authority which seems to sustain the plaintiff in error, is *Morris vs. Miller, Burrow*, 2057. This was a case of *crim. con.* and the evidence relied upon to show the marriage of the plaintiff, was articles entered into after marriage, to settle the wife's estate, co-habitation, bearing the name of the plaintiff, and reception of the woman by every body, as the wife of the plaintiff. Lord *Mansfield* held it insufficient, saying, "we are all clearly of opinion that in this kind of action—an action for criminal conversation with the plaintiff's wife—there must be evidence of marriage in fact; acknowledgement, co-habitation and reputation are not sufficient to maintain this action." He put his ruling upon two grounds: "1st. because *crim. con.* is a "sort of criminal action;" and 2d. because "it could not depend upon the mere reputation of marriage, which *arises* from the *conduct or declarations* of the *plaintiff himself*." It is true,

that his Lordship also said, that in prosecutions for bigamy, a marriage, in fact, must be proved. Now it is clear, that the rule laid down as applicable to actions of *crim. con.* is right. The *plaintiff* shall not be permitted to make evidence for himself. Lord *Mansfield* would not permit him to do this, in *Morris vs. Miller*, and that is the extent to which the *judgment* goes, in that case. The other case relied upon in England, is *Birt vs. Bartow, Douglass*, 170, which was also a case of *crim. con.* and ruled by Lord *Mansfield*, in the same way and for the same reasons. Now, do not these cases stand upon different principles from the case at this bar? There the *plaintiff's* acts and admissions in his own favor, to make out his own case, were excluded; but here, it is the admissions of the *defendant*, made against his interest, and sought to be used by his adversary, the State, that we are asked to reject. They certainly do. The American cases are sustained upon the authority of these two English cases, and I believe none other from that quarter. At the same time, I concede, that according to the *obiter* of Lord *Mansfield*, in criminal prosecutions, a marriage in fact must be proven. In relation to the case of *Morris vs. Miller*, it is farther to be remarked, that the *admissions* of the defendant as to the *fact* of the plaintiff's marriage, were not ruled out. There was in that case some admissions by the defendant. He being surprised at a lodging with the plaintiff's wife, and asked where *Major Morris'* wife was, replied, "in the next room." This was holden insufficient, because it was only a confession of the *reputation* of the marriage. See *Buller's Ni. Si. Prius*, 28. In the case of *Rigs vs. Curgenvin*, 3 *Wils. R.* 399, where the case of *Morris vs. Miller* was cited and considered, the Court say, "to be sure, the defendant saying in jest, or in loose rambling talk, that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in that action (*crim. con.*); but if it were proved that the defendant had seriously or solemnly recognized that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to the Jury, without proving the marriage." So, an admission on the record, in a previous judicial proceeding, of the validity of a first mar-

riage, was admitted against the defendant, in a prosecution for bigamy. 1 *East. P. C.* 470, 471, '2. 2 *Chitty's Crim. Law*, 472, notes. *Chitty*, in a note to the title, "indictments for bigamy or polygamy," says, "any evidence seems to be sufficient, which will convince the Jury that an actual marriage was completed." 2 *Chitty C. Law*, 472, note. *Phillips*, commenting upon the case of *Morris vs. Miller*, writes, "this decision does not warrant the conclusion, that a distinct and full acknowledgment of the marriage, made by the defendant himself, will not be evidence of the fact, as against him, and sufficient to dispense with the more formal and strict proof of marriage." 2 *Phillips' Evid.* 210, 211. In the case of *Regina vs. Upton*, being an indictment for polygamy or adultery, the prisoner's deliberate declaration, that he was married to the alleged wife, was held sufficient evidence of marriage. 1 *C. & Kir.* 165, note. From this notice of the English decisions, it does not seem to us, that the Common Law, as we adopted it, contains a settled rule, that in prosecutions for bigamy or adultery, the admissions of the defendant, as to the fact of marriage, shall be excluded. We are not therefore required, by the Common Law, to adopt such a rule in the Courts of Georgia. We are at liberty to settle it here, there being no legislation upon the subject, according to our own views of principle and policy. If we seek counsel from the *American books*, we find them contradictory. In *Massachusetts*, it would seem, that the Courts are disposed to exclude all evidence of marriage, but the highest. 9 *Mass.* 492 and 15 *Ibid*, 163. In *New York*, it has been held, that in prosecutions for bigamy, the confessions of the party are not sufficient, but a marriage in fact must be proved. 4 *Johns. R.* 52. 7 *Johns. R.* 314. So also, in *Connecticut*. See *The State vs. Roswell*, 6 *Conn.* 446. See also, 1 *Marsh R.* 391. In *Pennsylvania*, the contrary rule obtains. 8 *Serg. & Rawl.* 159. See also, 7 *Greenl. R.* 57. 1 *Ashmead*, 272. 2 *Fairf.* 391.

Marriage, by the Common Law, entered into by persons competent to contract it, is valid, if the contract be made *per verba de presenti*, without cohabitation, or if made, *per verba de futuro*, and be followed by consummation. This doctrine of the Common Law

obtains generally in the States, unless altered by the Statute. There is nothing in our Statutes which repeals it. No form is prescribed for solemnizing marriage—no form of proof is required. Penalties are prescribed against persons who shall perform the ceremony without a license, or publication of banns, to which they would be answerable; but upon Common Law principles, such marriage would not be void for want of license or publication of banns in Georgia. It is manifest then, that if marriage in fact, must be proved, and contract alone is necessary to make a valid marriage, the contract must be proved. In cases (and they are most numerous) where the contract is not in writing, the marriage, if confessions are excluded, could be proved only by witnesses; and if a marriage, in fact, in criminal prosecutions, must be proved by the production of witnesses, the result would be, that many cases where proof of marriage is necessary to conviction, could not be made out. The witnesses could not be produced. They die, or in this wandering, unsettled age and country, are soon scattered to the inaccessible ends of the earth. These considerations demonstrate the policy, in our country, of the rule which we have adopted.

Let the judgment be affirmed.

No. 11.—GEORGE M. DUNCAN, plaintiff in error, vs. SEABORN C. BRYAN, trustee, &c. defendant in error.

[1.] W, a *feme covert*, applied to the Superior Court to have D appointed trustee of certain slaves, claimed as her *separate* estate. D assented to the order and accepted the trust, taking possession of the property: *Held*, that in a suit at the instance of W, the *cestui que trust*, that D was precluded from denying the trust and setting up title in the husband of W to the negroes, in order to secure himself from accounting.*

*NOTE.—See next case.

Duncan vs. Bryan.

Motion to dismiss a bill, in Dooly Superior Court. Decision by Judge WARREN, November Term, 1851.

Seaborn C. Bryan, as trustee for Mrs. Mary Wallace, filed a bill against George M. Duncan, her former trustee, alleging, that Wm. Britton, by his last will, made the following bequest :

“ *Item.*—I lend to my niece, Mary Edwards, one negro girl and her increase, Corboro, during my niece’s natural life, and at her death, to the lawful issue of her body,” and a limitation over, in case of her death without lawful issue.

That Mary Edwards intermarried with Richard Wallace and had issue, William T. Wallace ; that Richard Wallace, being involved in debt, and his creditors being about to interfere with the said negro and her increase, to pay his debts, the Superior Court of Houston County, at its Term, 18 , upon the petition of Mary Wallace, appointed James Holderness, trustee, to protect and preserve the rights of the said Mary to the said negroes ; that at the April Term, 1841, the same Court appointed George M. Duncan trustee in the stead of James Holderness, who was present consenting thereto, and who accepted the trust and received from Holderness the proceeds of the hire of the negroes ; that in 1844, Duncan delivered up to Mrs. Wallace, a portion of the negroes, but retained the balance, under a pretended claim.

The prayer of the bill was, for an account for all the hire and profits of the negroes, and that he be decreed to deliver up to the present trustee, the remaining negroes. Defendant’s counsel moved to dismiss this bill, on the ground that the case made did not authorize a decree.

The Court below refused to grant the motion, and this decision is brought up for review.

S. T. BAILEY, for plaintiff in error.

G. R. HUNTER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

William Britton died in South Carolina, bequeathing to his niece, Mary Edwards, a negro woman by the name of Corboro. The following is the clause in the will of Britton, disposing of this property: "I lend my niece, Mary Edwards, one negro girl and her increase, Corboro, during my niece's natural life, and at her death, to the lawful issue of her body; and in case my niece Mary should die without issue or a minor, then it is my will and desire, that this negro girl, Corboro, and her issue, should revert to my niece, Nancy, and in like manner to the lawful issue of her body."

Mary Edwards, the legatee, afterwards intermarried with Richard Wallace, and removed to the State of Georgia. Wallace, the husband, being in debt, and his creditors having instituted proceedings to subject Corboro and her children to the payment of their claims, Mrs. Wallace, the wife, came into Court and applied to have James Holderness appointed her trustee, to protect this property from her husband's contracts. Holderness, some time thereafter, surrendered up the trust, and George M. Duncan, the defendant, with his consent, was substituted as his successor.

And this bill is filed by Seaborn C. Bryan, who has been appointed trustee, *pendente lite*, of Mrs. Wallace, to compel Duncan to account for this property and its proceeds. Duncan, by his solicitor, moved to dismiss the bill for want of equity, which motion was refused by the Court, and this refusal is assigned as error.

The general doctrine is not disputed, that one who has accepted a trust and acted upon it, will not be allowed to repudiate it when called upon to account. But it is insisted that, under the will of Britton, Mrs. Wallace took no separate estate, but an estate for life or *in fee*, which was transmissible, and upon which the marital rights of Wallace, the husband, attached; that as to these slaves, she is not *sui juris*, and that Chancery cannot render a decree in her favor.

We concede that this is the true construction of Britton's will,

and that if the right of Mrs. Wallace rested on this foundation alone, that it could not be sustained. But Duncan having acknowledged this to be *separate property*, and it having been adjudged to be such, by a Court of competent jurisdiction, whose decision remains unreversed; and Duncan having obtained possession of the negroes, under the order of the Court appointing him trustee, it is neither consistent with sound law nor good conscience, to permit him to deny the relationship, when summoned by that same Court, to account for his stewardship.

By the order of the Court appointing him trustee, this is *separate property*, so far as he is concerned, and Mrs. Wallace is *sui juris*, as to this estate, in a controversy between her and her trustee. Should the rights of third persons intervene, either of Mr. Wallace, the husband, or of his creditors, who were no parties to this proceeding, the question would present a very different aspect.

While it is admitted that Duncan cannot deny his character of trustee, it is argued that he holds the slaves in trust for the *true owner*, and not for Mrs. Wallace. The answer to this is, that Duncan was appointed trustee for the *wife*, and for nobody else; and that as yet, no other parties are before the Court.

Again, it is contended that the order appointing Duncan, was *ex parte*, and therefore, not binding. Grant this, notwithstanding the contrary appears by the record to be true, still, if Duncan came in afterwards and made himself a party to it by accepting the trust, as he did, it is such a ratification of the proceeding as would conclude him. In short, having consented to act as Mrs. Wallace's trustee, he will be forever afterwards precluded from contesting the fact in any suit between themselves. The law forces no one to accept a gift of an estate, whether made in trust or otherwise. It was competent for Mr. Duncan, to refuse both the estate of Mrs. Wallace and the office attached to it. But having once accepted the trust and got possession of the property, he cannot renounce or throw off the duties and responsibilities thus voluntarily incurred.

We cannot discover any error in this case, and therefore affirm the judgment.

NO. 12.—SEABORN C. BRYAN, trustee, &c. plaintiff in error, vs.
GEORGE M. DUNCAN, defendant in error.

- [1.] Where the will of a testator contained the following bequest: "I *lend* to my niece, Mary Edwards, one negro girl and her increase, Corboro, during my niece's natural life, and at her death, to the lawful issue of her body; and in case my niece Mary, should die without issue or a minor, then it is my will and desire that this negro girl, Corboro and her issue, should revert to my niece, Nancy, and in like manner to the lawful issue of her body." *Held*, that the word *lend* was equivalent to the word *give*, and vested such an estate in the legatee to the property, as on her intermarriage, the marital rights of her husband would attach, and be liable for the payment of his debts.
- [2.] Where a married woman petitioned a Court of Chancery, for the appointment of a trustee, to protect what she supposed was her separate property, and such trustee was appointed and accepted the trust: *Held*, that such judgment did not prejudice the legal rights of the husband to such property, who was no party to it, nor his creditors, nor a *bona fide* purchaser from him.
- [3.] A trustee may purchase the trust property from his *cestui que trust*, who is *sui juris*, provided there is a distinct *bona fide* contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should purchase, and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee.

In Equity, in Dooly Superior Court. Tried before Judge WARREN, November Term, 1851.

The bill filed in this case, by plaintiff in error, as the trustee of Mrs. Mary Wallace, a *feme covert*, set forth that Wm. Britton, by his last will, made the following bequest:

"*Item*.—I lend to my niece, Mary Edwards, one negro girl and her increase, Corboro, during my niece's natural life, and at her death to the lawful issue of her body," with a limitation over, in case of her death without lawful issue.

Mary Wallace intermarried with Richard Wallace, and had issue, William S. Wallace. Richard Wallace being involved in debt, upon the petition of Mary Wallace to the Superior Court of Houston County, a trustee was appointed to protect the

said negro and increase, as the separate property of Mary Wallace. Afterwards, at April Term, 1841, George M. Duncan was appointed trustee, and accepted the trust, and retained possession of the property and its hire, until 1844, when he delivered up a portion of the negroes, retaining the remainder, under a claim founded upon a sale from Wallace and wife, to him. The prayer was for an account and the delivery up of the balance of the negroes, as trustee under the aforesaid appointment.

The answer of Duncan admitted the facts charged as above, but submitted that under the will of Britton, no separate estate was created in Mrs. Wallace, but that Richard Wallace, by his marital rights, was the true and lawful owner of the estate taken by Mrs. Wallace under the will.

The answer farther stated, that all the negroes claimed as trust property, were levied on as the property of Richard Wallace, and defendant, as trustee, interposed, or rather prosecuted a claim thereto, until the year 1844, when he was advised by his counsel, W. Poe, Esq. and H. G. Lamar, Esq. that the property was subject to the *fi. fas.* against Richard Wallace; that Richard and Mary Wallace, under the advice of the said counsel, then became anxious to sell a portion of the negroes and pay off the judgment, and thus secure the remainder of the property to Mrs. Wallace; that they urged on defendant to become the purchaser of five of the negroes, which he consented to do, and gave therefor a full price. By the advice of the said counsel, the bill of sale was made by Wallace and wife, to James E. Duncan, who then conveyed to defendant; the whole arrangement being made with the knowledge and consent of Mrs. Wallace, and being in every respect, fair and *bona fide*.

The answer farther stated, that the defendant had fully accounted for the hire, &c.

A great volume of evidence was submitted on the trial, the sum of which was, to sustain the answer of defendant, in whose favor the Jury rendered a verdict.

To the rulings of the Court upon this trial, exceptions were filed.

1st. The complainant objected to the admitting in evidence the bill of sale from Richard Wallace and wife, to James E. Duncan ; the bill of sale from James E. Duncan to George M. Duncan ; the *fi. fas.* against Wallace, paid off by Duncan ; a receipt of Mary Wallace for \$737, in part for hire of negroes.

The Court overruled the objections, and to each decision exceptions were filed.

2d. Complainant objected to the reading in evidence the depositions of W. Poe, Esq. in reference to the advice and counsel given by him, as set forth in defendant's answer, on the ground that these were confidential communications.

The Court overruled the objections and complainant excepted.

3d. Complainant's counsel requested the Court to instruct the Jury as follows :

1st. That the receipt and acceptance of the property sued for as trust property, and the hiring of it as trust property, is conclusive as to the character of defendant's possession, and estops him from denying his character as trustee, or the title of Mrs. Wallace.

2d. That defendant is also estopped from denying his character as trustee and the title of Mrs. Wallace, by interposing a claim to the property and giving a claim bond.

3d. That when a trustee buys of his *cestui que trust*, the purchase, though not absolutely void, is voidable, and may be set aside at the instance of the *cestui que trust*, who has the option of vacating or affirming the purchase ; and it makes no difference that the sale was *bona fide*, and for a fair price, provided the *cestui que trust* makes the application within a reasonable time ; and in this case, the time runs only from the appointment of Bryan, she being under disability.

4th. That if the Jury believed from the evidence, that the defendant purchased from Mr. and Mrs. Wallace, the latter being his *cestui que trust*, himself, but procured them to make the bill of sale to James E. Duncan, his brother, and James E. Duncan conveyed to defendant, it is evidence of fraud, and the sale

should be set aside ; and where the sale is set aside on the ground of actual fraud, the purchaser is not entitled to a return of the purchase money.

5th. That the trustee cannot himself buy or purchase of the *cestui que trust*, the trust property to pay the debts which he holds against the husband of the *cestui que trust*, unless by the express and free consent of the wife, *cestui que trust*, which consent must be unequivocally shown ; and not then, until the relation of trustee and *cestui que trust* is dissolved. And that a trustee of a *feme covert* will not be permitted to mismanage the trust estate so as to subject it to the debts of the husband ; and a Court of Equity will follow the trust property into the hands of the holder, unless when found in the hands of a *bona fide* holder without notice of the trust.

6th. That the defendant, Duncan, cannot set up the title of Richard Wallace, if he had any, bought by the said Duncan, as a defence in the present suit ; and complainant, to entitle himself to a decree, is not bound to do more than to show that defendant received the property as trust property ; and if this fact is shown, the Jury should decree in this case, the return of the trust property to Mrs. Wallace, upon condition of the purchase money with the interest, being re-paid, and the defendant paying the hire of the negroes which accrued, and for which he is liable ; and that defendant is liable for the hire of the negroes from the time he was appointed trustee.

7th. That if the Jury believe from the evidence, that the bill of sale taken by Duncan, defendant, from Wallace and wife, through James Duncan, was intended as a mortgage merely, that the complainant may redeem the property under the circumstances of this case, on the re-payment of the money advanced by Duncan, with the interest on it, and that defendant should pay a reasonable hire for the negroes, and be decreed to return the same.

8th. If the Jury believe from the evidence, that the bill of sale was signed by Mrs. Wallace, under the influence, and at the request of her husband, or of her trustee, or of both com-

bined, and not freely and voluntarily, that the sale should be set aside, and the property sued for delivered up, and the hire paid; and that the law presumes that the wife is at all times under the control of her husband, and the onus of showing she has acted voluntarily, is on the defendant. And if the sale is put aside upon this ground, the Jury should put the parties back where they were, giving the negroes to complainant, and allowing defendant to keep open his *fi. fas.* against Wallace.

9th. That if the Court should be of opinion that the will of William Britton was material in this case, that said will does not vest a fee simple estate in Mrs. Wallace, formerly Mary Edwards, in the negro Corboro and her increase, but constitutes a mere loan for life, under which she is entitled only to the use, as a personal benefit, of the negro and her issue, at the pleasure of the lender, and took no estate or title to the negro Corboro, or her increase, that she or her husband could convey to a purchaser.

10th. Defendant cannot charge and discharge himself by his answer; that he cannot by his answer in this case, discharge himself from his liability to account for the property he received as trustee, and the hire thereof, but must establish his disbursements, if any, by independent testimony.

The Court declined and refused to give these instructions to the Jury, except the 10th and last; and on the above stated nine grounds, charged the Jury as follows:

1st. The Court charged the Jury, that it could not charge upon the first ground as requested, but charges that the acceptance of the property sued for, by Duncan (defendant) as trust property, is conclusive as to his being trustee; but if afterwards, Wallace and wife became convinced that the property was not trust property, from the advice of counsel, that defendant is not estopped from disputing complainant's title to the negroes; otherwise he is. Having been advised by counsel, that it was not-trust property, defendant might purchase it and take a good title, if Mrs. Wallace had also been apprised of the advice that it was not trust property, and the sale was a fair and *bona fide* sale.

2d. The affidavit and claim bond of Duncan, does not estop

him from denying complainant's title to the property, when the trustee and *cestui que trust*, under the advice of counsel, acted under the belief that it was not trust property, if no advantage was taken of Mr. and Mrs. Wallace to convince them it was not trust property, and Duncan had claimed *bona fide*, and afterwards acted under the advice given by counsel, and with a knowledge of this by him and Mrs. Wallace.

3d. The third request, is the law where the trustee purchases at public sale, or at private sale from himself. A trustee may purchase the trust property of his *cestui que trust*, under circumstances which would prevent its being avoided on terms. The trustee may deal with his *cestui que trust*; but if any advantage is taken—if the facts show a strong suspicion of fraud—the Jury may set aside the sale. And slighter evidence is required in this case to rescind the contract, than in an ordinary case; and Courts and Juries should scrutinize with care, transactions between trustee and *cestui que trust*, at the suit of the *cestui que trust*.

4th. The purchase, through James Duncan, is good, if Mrs. Wallace knew that George M. Duncan was taking the title through James Duncan. If there is fraud in the purchase, and the sale is rescinded upon that ground, the purchase money should be refunded. If, however, any advantage was taken by the trustee in the purchase, it would vitiate the purchase.

5th. If this was a trust estate, which in the opinion of the Court it is not, and Duncan purchased it without the consent of Mrs. Wallace, the sale should be set aside.

6th. If the property sued for here, was the trust property of Mrs. Wallace, Duncan could not set up the title of Richard Wallace against it; but this is not trust property.

7th. If the bill of sale relied upon by defendant, was a mortgage merely, complainant's bill should have been filed to redeem the property; but under this bill, the relief asked for could not be granted, as the bill does not set up a mortgage, so as to enable defendant to reply and defend himself against such a case.

8th. If there are any circumstances of fraud, the Jury may judge of them. In this case, the wife cannot be presumed,

without proof, to be under the influence of her husband, when there is no charge in complainant's bill, that she, Mrs. Wallace, had signed the bill of sale under the influence of her husband.

9th. The Court is of opinion that the will is material in this case. Under the will of William Britton, a life estate in the negro woman, Corboro and her increase, is given to Mary Edwards, now Mrs. Wallace; and it is not now necessary for the Court to determine whether the remainder over is good or not. Under this will, Richard Wallace, the husband of Mrs. Wallace, by virtue of his intermarriage with Mary Edwards, took an estate for his wife's life in the negro Corboro, and her increase, which Richard Wallace could sell; and it could have been sold by his creditors for his debts, under Mr. Britton's will.

The Court having charged as stated on the preceding grounds, then proceeded to charge the Jury farther:

That the purchase in this case from Mrs. Wallace is not, *per se*, void. There must be some evidence of fraud, and the bill does not sufficiently charge the fraud in this case. If Poe advised Mrs. Wallace and Mr. Wallace, and Duncan, that it was not trust property, then Duncan can purchase. It depends on whether the parties were advised that it was not trust property, and whether it was a fair and *bona fide* transaction, in this, that it was well understood by them, that the advice of counsel was, that it was not trust property.

To which charge, as given to the Jury, and refusal to charge as requested, solicitors for the complainant, in open Court, and during the trial of said cause, excepted.

Upon each of these several exceptions, error has been here assigned.

J. C. MOUNGER and G. R. HUNTER, for plaintiff in error.

S. T. BAILEY, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

On the trial of this cause in the Court below, various excep-

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tions were taken to the rulings of the Court, most of which, must necessarily depend upon the decision of the main and controlling question made by the record.

The great question in the cause is, whether the defendant, George M. Duncan, who was appointed trustee of Mrs. Wallace, of what was supposed to be her separate property, under the last will and testament of Wm. Britton, deceased, and who accepted the trust, is now *estopped* from setting up a title to the property derived from Mary Wallace, his *cestui que trust*, and her husband, Richard Wallace, according to the facts disclosed by the record before us?

[1.] The first question to be settled is, whether that clause of William Britton's will, under which Mrs. Wallace derives her title to the slave Corboro and her issue, created and vested in her, a *separate* estate, to which the marital rights of her husband could not, and did not attach, on her intermarriage with him. The clause of the testator's will, under which Mrs. Mary Wallace claims Corboro and her increase, as *separate* property, is in the following words: "I *lend* my niece, Mary Edwards, one negro girl and her increase, Corboro, during my niece's natural life, and at her death, to the lawful issue of her body, and in case my niece Mary should die without issue, or a minor, then it is my will and desire, that this negro girl, Corboro and her issue, should revert to my niece, Nancy, and in like manner, to the lawful issue of her body."

Whether Mary Edwards (now Mrs. Wallace) took an absolute estate to the negro and her increase, or only a life estate, was not made a question on the trial, and we express no opinion as it regards that point. The question now made for our consideration and judgment is, whether a *separate* estate was created to the property bequeathed to Mrs. Wallace, so as to prevent the marital rights of her husband from attaching to it.

It is insisted by the counsel for the plaintiff in error, that this was a *loan* of the property by the testator to the legatee; that the title thereto remained in his legal representatives after his death, and that no title vested in Mrs. Wallace. This is certainly a

very strange and inconsistent argument, to be urged by the counsel for Mrs. Wallace, who is seeking to make the defendant responsible as her trustee, on the ground, that this identical property is her *separate* estate, under the will of her father. If *no estate* to the property vested in her under the will, of course, she had *no separate estate* in the property. In our judgment, however, she took at least a *life estate* in the slave Corboro and her issue. The word *lend*, as used by the testator in this will, is equivalent to the word *give*; for the reason, that the testator evinces a clear intention to part with the *entire dominion* over the property bequeathed. After his death, the property never could have reverted to his executors. A *final* disposition of it is made by the testator. *Hinson and wife vs. Pickett*, 1 *Hill's Ch. R.* 38. The legatee, then, took at least a *life estate* in the property bequeathed, and there being no words in the will, creating any *separate* estate to the property in her, the marital rights of her husband attached thereto, and the same, by operation of law, became his property, and liable for the payment of his debts.

[2.] Taking this view of the estate created by the will of Wm. Britton in Mrs. Wallace, the next point made by the record is, that inasmuch as Duncan was appointed trustee by the Court of Chancery, on the motion of Mrs. Wallace, to protect this particular property, as her *separate trust property*, and having accepted the trust, he is now *estopped* from denying that it is her separate trust property; and therefore, he shall not be permitted to show that he has made a *bona fide* purchase of this property from Richard Wallace, her husband, with the *knowledge* and *consent* Mrs. Wallace, his *cestui que trust*.

Conceding as we do, that in a mere contest between the *cestui que trust*, and her trustee, for an account of the trust property, *without more* the trustee could not defend himself from accountability, by showing that some third person had a paramount title to the property in his hands, which he had received as trust property under his appointment, from his *cestui que trust*; yet, that is not the case made by this record. The record here shows that the property in controversy, was levied upon to satisfy sundry executions obtained against Richard Wallace, in favor of his

creditors; that the defendant, as the trustee of Mrs. Wallace, prosecuted a claim to that property, as provided by Statute, and during the pendency of that claim, he was advised by his counsel, that it could not be sustained in law, but that the property would be found subject on the trial—the same not being the *separate* property of Mrs. Wallace, under the will of her uncle. Acting upon this advice of counsel, an arrangement was made between the creditors of Wallace and the defendant, with the consent and approbation of Richard Wallace and his wife, that the defendant should purchase eight of the negroes, and pay the executions with the proceeds, so as to enable Wallace and wife to retain the balance of the negroes. Wallace and wife executed a bill of sale to James E. Duncan, for the negroes, with the knowledge and understanding at the time, that it was for the benefit of the defendant, who was the actual purchaser of the property from Wallace and wife. Subsequently, James E. Duncan conveyed the property to the defendant. The Jury have found by their verdict, that the purchase of the eight negroes by the defendant, was a fair and *bona fide* transaction, and that he has fully accounted for the use of the property while he held it as the trustee of Mrs. Wallace. The plaintiff in error makes two points in relation to this branch of the case. First, he insists that the defendant is *estopped* from setting up his title from Richard Wallace to the property, for the reason, as he alleges, that he received it into his possession as the *separate property* of Mrs. Wallace. Second, that considering it as the separate property of Mrs. Wallace, the sale of the property by her to the defendant, as her trustee, was void, especially as the sale was made through the intervention of a third person. Now, in relation to the first point, it is quite clear, we think, that the judgment of the Superior Court, appointing the defendant as trustee, and his acceptance of the trust, did not and could not, have *prejudiced* the rights of Richard Wallace, the husband, or his creditors, who were not parties to that judgment. The mere application, on the part of Mrs. Wallace, to have a trustee appointed, to protect what she may have *supposed* was her separate property, and the appointment of such trustee, did not divest the husband of his

title to the property, which he acquired by virtue of his marital rights.

The defendant derives his title to the property, not only from the husband, who was in fact, and in law, the owner of it, to the extent of his wife's interest; but he also derives his title from Mrs. Wallace, his *cestui que trust*, which involves the second proposition contended for at the bar.

[3.] Viewing this as the *separate* property of Mrs. Wallace, and that she held it *sui juris*, still it was competent for her, according to the facts stated in this record, to have made the sale of it to the defendant. In *Coles vs. Trecothick*, Lord Eldon holds, that a trustee may purchase from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a *jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him, in the character of trustee.* 9 Vesey, 246. *Hill on Trustees*, 537. If this property was the *separate* property of Mrs. Wallace, as is contended, by virtue of the appointment of the defendant as trustee, she was, as to this separate property, *sui juris*, and might have disposed of it to the defendant, in the absence of all fraud, concealment, or advantage, on his part. It is true, that Courts of Equity will look with a jealous eye to purchases made by trustees of their *cestui que trusts*, although the latter may be *sui juris*, but we are not prepared to hold that such purchases are absolutely void, *per se*. As to the bill of sale having been made in this case, to James E. Duncan, we have only to say, that it was so made with the knowledge and consent of the alleged *cestui que trust*. It is not a case in which the instrumentality of a third person is invoked, for the purpose of blinding or deceiving the *cestui que trust*, without her knowledge, to enable the trustee to acquire the title to the trust property.

According to the facts disclosed by the record before us, neither the law nor the justice of the case, is with the plaintiff in error. The whole effort appears to have been, in the Court below, to exclude the true facts of the case, by relying on the

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technical doctrine of *estoppel*, and by the operation of that rule, to make the defendant liable as a trustee for the *separate* property of Mrs. Wallace, which never was her separate property, but the property of her husband, and liable for the payment of his debts. In other words, after the parties had become satisfied it was not the separate property of Mrs. Wallace, she consented for the defendant to purchase it, and apply the purchase money in payment of her husband's debts, to which the property was subject, which he has done; and now she seeks to make him account for the property again to her, as her trustee, on the ground that he is *estopped* from denying that it is her separate property; not that it is in fact her separate property in law, but that the defendant cannot, by a technical rule, be permitted to deny it.

The defendant claimed title to the property by a *bona fide* purchase from Richard Wallace (in whom was vested the legal title) with the *knowledge* and *consent* of Mary Wallace, the alleged *cestui que trust*, she having joined her husband in making the bill of sale; so that in any view, the defendant has the legal title to the property; and in our judgment, from the record before us, the equitable title also. The Court below then, did not err in refusing the instructions asked, in view of the facts of this case, nor in the instructions given to the Jury. Although we might not be willing to indorse all the legal propositions asserted by the Court, without qualification; yet, so far as the same were applicable to the facts of this case, the plaintiff in error has no cause of complaint. From the view which we have taken of this cause, it follows that the bill of sale from Wallace and wife, to James E. Duncan, and from the latter to George M. Duncan, as well as the *fi. fas.* against Wm. Wallace in favor of his creditors, were competent testimony, and properly admitted in evidence. The receipt from Mary Wallace to the defendant as trustee, while acting as such, was properly admitted in evidence—her handwriting having been first proved.

The evidence of Washington Poe, Esq. was also properly admitted, for the purpose of showing that the defendant acted in *good faith* in making the purchase of the negroes. It is true, that a party who acts on the advice of counsel in regard to his

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legal rights, must act on his own responsibility; yet, in this case the advice was in accordance with the legal rights of the parties, and the defendant did right in following it. A Court of Equity, as a general rule, will sanction that which it would decree to be done, had the parties been before it.

The copy of the will admitted in evidence, was attached as an exhibit to the complainant's bill, and admitted by the defendant's answer, and we think, was properly admitted in evidence to the Jury.

Let the judgment of the Court below be affirmed.

No. 13.—DOE *ex dem.* SAMUEL GLADNEY and another, administrators, &c. plaintiffs in error, *vs.* ISAAC B. DEAVORS.

- [1.] Tax Collectors have power in this State, to issue execution against defaulting tax payers, for the collection of taxes—which the Constables and Sheriffs are bound to execute and return.
- [2.] A return made by a Constable, of "no personal property to be found," is admissible to prove that fact, when made by him on a Tax Collector's execution. Proof of that fact cannot be made by parol. There must be an official return of it.
- [3.] The State is bound by public laws, for the promotion of learning, the advancement of religion and the support of the poor, although not expressly named.
- [4.] The State is bound by the Acts of the Legislature, exempting certain articles of property from levy and sale for debts, for the benefit of the wife and children of the debtor; and such property cannot be seized and sold under execution, to pay the taxes due by him.

Ejectment, in Sumter Superior Court. Tried before Judge WARREN, November Term, 1851.

This action was brought by the lessee of Gladney and another, administrators of Godwin, against Isaac B. Deavors. On

the trial, plaintiffs offered in evidence a Tax Collector's deed, and, at the same time, a Tax Collector's *fi. fa.* against John Deupree, for the tax for the year 1841, issued September, 1841, and levied by the Tax Collector, October 29th, 1841. On the same day was an entry by A. B. McCrea, Constable, of "no personal property to be found." Objection being made by defendant's counsel, the Court ruled out the *fi. fa.* and entries thereon, on the ground that the Tax Collector had no authority, by law, to issue execution for taxes, except in cases where the Grand Jury had allowed his insolvent list; and in all other cases it was the duty of the Tax Collector to seize and sell without execution; that the Constable had no authority to make the return of "no personal property;" but that plaintiff might prove, *aliunde*, that there was no personal property. To all of which rulings and decisions, the plaintiff's counsel excepted.

Plaintiffs then introduced parol proof, to show that there was no personal property, from which it appeared that John Deupree had no personalty, except such as the insolvent laws exempted from levy and sale.

The Court charged the Jury that there was no personal property exempt from levy and sale for taxes, under the laws of Georgia—debts due the State not being included in the provisions of the insolvent laws. To this charge, plaintiff, by his counsel, excepted.

There was an exception filed to the charge of the Court, as to the question of fraud, on the ground that it was not authorized by the evidence. Under the view taken by the Supreme Court, of the other questions made in the record, it is unnecessary to repeat all the evidence, for the purpose of reviewing this question.

B. HILL and E. R. BROWN, for plaintiff in error.

H. K. MCCAY, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] A proper understanding of the relation which the Tax Collector bears to the Government, and of the duties which grow out of that relation, will enable us to determine, without much difficulty, the main questions made in this record. The first and most important of these, is this: "has the Collector authority to issue an execution to enforce the payment of taxes?" The Court below held that he has not, except in a single instance, to wit, against insolvent tax payers, after the allowance of the insolvent list by the Grand Jury. Upon a special grant, in the Act of 1804, this power in these cases, was conceded by the Court—the Court denying it to him generally. We differ with Judge *Warren*, and proceed to give our reasons: He is an agent of the State, by whom it exercises the sovereign prerogative of collecting, by coercion, if necessary, the taxes due by the citizen. He is not the agent of the people of his County, although they elect him—nor is he the agent of the Inferior Court of that County, but the agent of *the State*. The manner of his election and qualification, his duties and powers, and his compensation, are prescribed by law; and to secure the State, in the execution of his trust, he is required to give bond and security. The great duty devolved upon him, is that of collecting the taxes assessed by law, for the support of the government. The digest of tax returns being handed to him, it is his duty to proceed to collect them, according to that digest. *Cobb's New Digest*, 1073. He is required to pay the general tax into the State Treasury, and the County tax to the proper County authority to receive it, at a time prescribed by law. And inasmuch as the realization, with promptness and certainty, of the public revenue, is, with the State, a matter of paramount importance, indeed of uncontrollable necessity, he is made, together with his sureties, subject to immediate and stringent process of enforcement, in the event of failure to pay; he is made responsible to the Executive department. *Cobb's N. Dig.* 1046. If in default, he is not entitled to the ordinary rights of the citizen before the Courts of Justice. The State waits not for the tedious action of the Judiciary, in its usual forms of petition, process, defence, judgment and *fiery facias*. He may be com-

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pelled to pay, by a process issued at once from the Treasurer of the State, the general tax in arrear; and by execution issued at once, by the Inferior Court, for the County tax in arrear. *Cobb's New Dig.* 1052, 1056, 1066. He is liable to pay 25 per cent. interest on the sum due, which is also collected by execution. *Cobb's New Dig.* 1025, 1066. For further security of the public revenue, the property of the Collector and of his sureties, is bound from the date of his bond. *Cobb's New Dig.* 1056. From these statements, it will be seen that the great obligation of the Collector is to collect and pay over the taxes; also what stringent measures are provided by law to compel him to promptness and fidelity; and what cautious guarantees are provided against the loss of the public money. It will also be seen how fearful is the responsibility which the Collector assumes. Now under these circumstances, it would be unjust—nay, ruinously impolitic, for the State to leave her officer without the powers necessary to do his duty. She has not so left him, but has armed him with a part of her sovereign authority, to be by him wielded, immediately and directly, and without let or hindrance, for the purpose of collecting the taxes. I do not mean to say that she has delegated this power, with discretion to use it according to his own will, but that she has specifically clothed him with the power of a process to collect, highest in its direct efficacy, known to the usages of constitutional government. Call it what you please—execution, warrant of execution, or distress warrant—it is the process used in this very case—a process by which the property of the defaulting tax-payer is seized and sold to pay his taxes: a process which he is to issue without a judgment—without the intervention of a Jury—without a hearing on the part of the defaulter—which he may himself execute, or which he may cause to be executed by the Sheriffs and Constables; and the progress of which, when issued to collect State taxes, the Judiciary may expedite, but cannot impede, at the instance of the defaulter. The power, in short, is the power of sovereignty, placed by the law in the hands of the State's agent, to be by him executed, through the agency of a process of seizure and sale—the power of compelling the citizen to *perform*

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a duty, which is the very first obligation of citizenship—which is indispensable to the very existence of the government and to the enjoyment of his rights under the government, to wit, the duty of contributing his proportion of the public revenue. See *Doe ex dem. Gladney and another vs. Deavors*, 8 Geo. R. 479 to 486. Neither the power, nor the mode of exercising it, is unknown to the Common Law, or new in our own State. It has been exercised in Georgia for forty-seven years, if no longer; it has been acquiesced in by the people and the Judiciary; it has been recognized by the Legislature; and it has never been questioned until challenged in this case. I should, however, say that it is not really questioned in this case; for it will be seen, I think, before I close this opinion, that the controversy here, is more about names than things. I should state, too, that the Court below does not question the power of the State to invest the Collector with authority to issue an execution for taxes. The presiding Judge seems only to deny that this has been done. We think it has been expressly. By the Act of 1804, it is made the duty of all persons liable to pay taxes, to pay them to the Collector on or before a time specified, which time has been changed by later legislation. And if, on that day, any one is a defaulter, the Collector, the law declares, “shall *immediately* proceed against such defaulter, by *distress and sale*, (giving the notice which the law requires and stating the amount of tax due by such defaulter,) *of goods and chattels, if any to be found; otherwise of the lands of such defaulter or defaulters, or so much thereof, as will pay the taxes due, with costs.*” Cobb’s *N. Dig.* 1048. Herein, the power to issue a process to collect taxes is given, in so many words. From this clause in the Act of 1804, we have no doubt, was originally derived the usage, which has obtained from that day to this, of issuing *executions* for taxes. If the power is granted in the Act of 1804, there is no necessity of going farther back in search of it. That this clause of the Act of 1804, has been repealed, is not pretended. What enactments are found in the late Act changing, fundamentally, our system of taxation, in relation to this matter, if any, I do not know, as it has not yet been published. This

cause, however, is to be decided under the old law. Whilst the counsel for the defendant in error, admits under the Act of 1804, that the Tax Collector is authorized to *distrain* and sell, he denies that he is authorized to issue execution to sell. I think that this is a distinction without a difference. Whilst the Statute says that he may collect by *distress* and sale, I think it is very clear, that it intends a sale by *execution* in one legal sense of *execution*. It is clear to my mind, that the process issued in this case, was legally issued under the Act of 1804; it may not be, it is not a *fiery facias*, yet it is a process of execution. If it be not an execution in one sense of that word, and is in another—or if it is not in any sense strictly an execution, yet is *the process* contemplated by the Act. The Court erred in denying to the Collector the power to issue it. The old Common Law idea of distress, is the seizure of the property by a landlord, to be held by him, as a pledge for the performance of feudal service. It came to be used as a remedy to collect rent in arrear, and to compel the performance of other duties. A man was allowed to use it, independent of the Courts, to avenge himself or to minister to his own redress. But long before the year 1804, it had lost its original character as a process of seizure and detainer, and had become a process for seizure *and sale*, regulated by Statute. From being a feudal power in the hands of a landlord, to coerce payment of feudal dues or the performance of feudal service, it became a remedy, in the hands of a citizen, regulated by Statute, to coerce payment of rent, or to avenge a trespass by cattle, damage feasant. It was no longer a process simply of seizure and detainer, but a process of seizure and *sale*; and when thus modified, it partook at once of the nature of *an execution*. It is distress, as it was understood at Common Law in 1804; (that is, a process of collection in the nature of an execution,) that the Act of 1804 includes. This process was primarily “in nature of a *nomine pænæ* to compel payment” and the right to sell was added by Statute, and its whole character changed. 3 *Black. Com. C.* note 8. *Ibid.* 14. 3 *Kent*, 476. It was a remedy also for a debt due to the Crown. In such cases, the property was *salica-*

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ble. 3 *Black.* 14. *Bro. Ab. t. Distress*, 71. So also for an amendment imposed at a Court-Leet, (8 *Rep.* 41,) partly, says *Blackstone*, because, being the King's Court of record, its process partakes of the royal prerogative; but principally, because it is in the nature of an execution to levy a legal debt. He farther says, that the distresses given by Statute, are in the nature of executions. Although it was a remedy which an individual might use, without a judgment, yet it became a remedy even in his hands, in the nature of an execution. But more particularly, distress was a remedy at Common Law, to collect debts due the Crown—or rather, I should say, to compel the performance of a duty, which the subject owed to the Crown. Just in this light, the Legislature, no doubt, viewed it in 1804, to wit, as a means of compelling the citizen to perform the duty of paying taxes, which the law and the very nature of the civil compact impose upon him. It is no new process—we get it from our fatherland. Now, when used for this purpose in England, it was used as a process of seizure, with a power to *sell*, and was, therefore, in the nature of an execution. To illustrate the view which I take of this matter, and save further elaboration, I refer to the case of *Hutchins vs. Chambers*. The Justices had issued a warrant of distress, to compel the payment of a poor rate, under the Statute 43d Elizabeth. The Justices, Parish Officers, Constables, and their assistants, were all sought to be made liable as trespassers. Among other things, it was claimed that they were liable, because the property taken (*averia coruæ*) was not liable to be distrained for a poor rate. To this it was replied, that, although the process was a distress warrant, yet it was in the nature of an execution, and therefore, the property was liable to be seized and sold. The nature, therefore, of this process, was one of the matters submitted to Lord *Mansfield's* judgment. He said: “the solid distinction is, that the seizing under the 43d *Eliz.* and such like Acts of Parliament, is but partly analagous to the Common Law distress, (as being repleviable, &c.) but is much more analagous to the Common Law execution, (like a *fiери facias*, where the surplus after sale, shall be returned.) In the old Com-

mon Law distresses, which were in nature of a *nomine pœne*, to compel payment, it would have been absurd to have suffered the implements by which a man gained his livelihood to be holden as a pledge; because, that would be taking from a man the only means he had of being able to pay the debt. But this reason does not hold where the things distrained may immediately be sold, by way of satisfaction, *which although called distress, yet really is in this respect an execution.* 1 *Burrow*, 588. This case not only declares a distress to be in the nature of an execution, but it illustrates the origin of the very remedy which the Legislature put at the control of the Collector. In England, Parliamentary duties, as poor rates, were collected by distress and sale. So here, legislative duties, that is, duties or dues imposed by law, for public purposes, as poor rates, county taxes and general taxes, are collected by distress and sale, and the process of distress is an execution. It is not a *fieri facias*, for one sufficient reason—that is founded on a judgment. It must recite the judgment and follow it. *This process is not founded on a judgment—it issues without a judgment, and it is for this very reason that it is adopted.* The State cannot wait the tedious process of getting a judgment. If she were compelled to do this, her honor might be compromitted and the rights of her citizens jeoparded. Hence, she clothes her collecting agent with power to issue a process *at once*, which will *at once* command her means. Of the same character is the power with which the Treasurer and the Justices of the Inferior Courts are clothed, to compel the Collector and his sureties to pay over the public moneys, when he is in arrear. To prevent abuse and wrong to the citizen, the process is subjected to control by law. For example, provision is made for selling property for the payment of taxes, at public outcry and upon notice. The tax, it may be further noted, falls under the Common Law designation of a *duty*. It is not a debt due by contract, in a legal sense of contract, but the payment of taxes is a duty which the citizen owes to the State. He is not to be considered as owning property, so long as it remains undischarged. It precedes and overrides all the obligations which grow out of contracts—it cannot

be superseded by liens—it is one of those deeply-laid foundations upon which governmental superstructure rests. At Common Law, the landlord might distrain himself or by his agent. In the latter event, he executed a warrant to seize and sell. Hence, the original of a distress warrant. So in this case, I have no doubt but it is competent for the Collector to execute his own warrant; but he may also do this, through the Constables and Sheriffs. The law has made it their duty, in so many words, to execute his warrants or executions. If it had not, he would be authorized to use them as his agents, for that purpose. Their general power, as levying and collecting officers, would authorize them to execute a Tax Collector's execution, when placed in their hands. But the Statutes require them to do it—point out the manner of doing it, and make them amenable for neglect of duty. Thus it is, that we hold: 1st. That the Tax Collector can issue execution to collect taxes; and 2d. That it may be executed by the Sheriffs and Constables, and that the Court erred in ruling the contrary. Having derived the power of the Collector, directly from the Act of 1804, by a course of reasoning and authority quite satisfactory to ourselves, courtesy to the learned counsel for the defendant in error, and that alone, induces me to notice one other argument used by him against the position, that it is granted to him by Statute. The argument is, that the Legislature having given, in particular cases, the power to issue execution, *eo nomine*, it is to be taken as having derived it, in all other cases, upon the maxim, *expressio unius, &c.* The answer to this argument is conclusive. Power to issue execution in the particular cases is given, not because the Collector did not possess the power generally, but because he did not possess the power in those particular cases. The general power did not extend to those cases, and therefore the special grant in those cases. If this be true, the maxim, *expressio unius, &c.* has no application. Thus, for example, whilst he had the power to issue execution against the *tax-payer*, he had no power to issue execution *personally* against his executor or administrator. Hence, for reasons satisfactory to the Legislature, it gave him power, in certain contingencies, to issue exe-

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cution against the executor or administrator, for the taxes of the decedent. So also he has power, generally, to issue execution against tax-payers, if they fail to pay, *after* the time of payment only; but the Legislature gave him power, where the tax-payer is about to *depart* the County, to levy for his taxes, unless he gives security, after his taxes are returned, *and before* the time of payment. *Cobb's New Dig.* 1049, 1050. So also, when the Grand Jury have allowed the insolvent list, the Collector is required to issue execution against the insolvents. Why? No doubt, because the Collector, without such express requirement, would have supposed, or might have supposed, that they were discharged, by being recognized by the Jury as insolvent, and that he had no authority to press them farther by execution. To guard against this evil, the power is expressly given in these cases. *Cobb's New Dig.* 1059. I have dwelt longer upon this exception than I would have done, but for the fact that I imagine that there prevails among the people very erroneous, or at least imperfect, views of the nature, powers, obligations and dangerous responsibilities of the Tax Collector's office.

✓ [2.] The lands of the defaulter are not liable to be sold for his taxes, unless there are no goods and chattels to be found. *Cobb's N. Dig.* 1048. On this execution the Constable made a return, contemporaneous with the date of the levy, of no personal property to be found. The Court having ruled out the execution, consistently ruled out this return, and the plaintiff in error excepted. We holding that the execution was rightly issued and that it was competent for the Constable to execute it, hold, as a consequence, that it was competent for him to make the return. ✓ Any officer authorized to levy the execution, is authorized also, to return the fact that there is no personal property. It is a power incident to his office, as levying and selling agent. That fact cannot, in a contest about the title of the property, ordinarily, be made to appear by parol. It is a muniment of title, and must be evidenced by an official return. We think that the Court erred in excluding it, and erred in afterwards deciding that the party might show by parol, that there was no personal

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property of the defendant in execution to be found. 3 *Kelly*, 224, 225.

[3.] The Court instructed the Jury, that no property was exempt from sale to pay taxes, and plaintiff in error excepted to this charge. By law, in this State, certain articles of property, such as bed and bedding, bed-steads, spinning wheel, a loom, a cow and calf, tools, cooking utensils, family Bible, &c. are exempted from levy and sale for debt. *Cobb's N. Dig.* 385. *Cobb's N. Dig.* 388, 389, 390, 391. The question made in this case was, whether the State is embraced within the operation of these laws; in other words, whether the property, exempt by law, from levy and sale to pay debts, is also exempt from levy and sale to pay taxes. These laws are founded in a humane regard to the women and children of families. The preamble to the Act of 1822 announces the grounds upon which the Legislature acted. "Whereas, (is its language,) it does not comport with justice or expediency, to deprive innocent and helpless women and children of the means of subsistence, be it therefore enacted, &c." *Cobb's N. Dig.* 385. *Justice* to women and children, in reserving the means of subsistence, and *public expediency*, or the interest which the State has in the sustenance and health and morality of the families of the people, were the inducements to this wisely benevolent legislation—legislation, standing in marked contrast with the heathenish severity of those laws, which, in some ages not very remote, not only subjected *liberty*, but also the *corpse* of a deceased debtor to the payment of debts. In this direction, progress has been improvement. In our judgment, *the State falls within the operation of a public law, passed for the benefit of the poor, and the State is within the policy of our own legislation upon this subject matter.* In England, as a general rule, the King is not bound by an Act of Parliament, unless expressly named therein. This is true here as to the State. No department of the Government can be divested of its constitutional powers, by an Act of the Legislature. Nor could the King be deprived of his prerogative by any general words in an Act of Parliament. The executive power shall not, then, be impaired by construction.

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Hence, generally, laws relating to all the subjects of the realm, do not bind the Crown, unless the King be named. But to this general rule, there are exceptions. *Bacon* says, "the Crown is bound by the general words of a Statute, made for the maintainance of religion, the advancement of learning, or the support of the poor;" and he gives for it a conclusive reason, to wit, "because all Statutes in which the public are interested, ought to be so construed, that they may be effectual." *Bac. Ab. title Statutes*, l. C. 13 *Petersdorf Ab.* 704. 11 *Rep.* 71. *Smith's Com.* 620. 1 *Black. Com.* 261, 262.

So also the State is bound, although not named by an Act of the Legislature, for the maintainance of religion, the advancement of learning or the support of the poor. If not bound, such Acts might be defective in their operations. The whole public being interested, they must be so construed as to be effectual—that is, they must be so construed as to protect the rights of the public under them. This rule of construction imperiously demands that the Acts under review be construed so as to embrace and bind the State. Without such construction, they might be ineffectual. If the State is not bound by them—if the exempted articles can be sold for the tax of the citizen, then in cases where the whole property, the family Bible for example, will only be sufficient to pay it, the whole benefit of the law is lost to the family; and in all cases the benefit of these laws is lost, and they become ineffectual, to the extent that the exempted property is applied to pay the tax. Such construction impairs no power of the Government. It does not interfere with the power to impose and collect taxes. It does not assume that the Legislature has not the right to impose the tax, or to appropriate all the property of the citizen to pay it. It goes upon the idea, that the Legislature has waived, for reasons of humanity and of State policy, the right in these cases to sell the exempted property, to pay taxes. That the Legislature may waive this right expressly, or expressly forbear to exercise it, I presume will not be questioned. I have no question but that it can do so, as in these instances, to an extent that does not in any sensible degree, abstract from the necessary revenues of

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the State. Should the Legislature, to suppose an extreme case, exempt *all* the property of the citizen from seizure and sale, to pay taxes, and thus defeat the tax-raising power, it would present a different question. We have no such question here. Well, if this can be done expressly, it can be done, and is done impliedly, in all cases where the implication is necessary to give effect to a public law, relating to the promotion of learning, the encouragement of religion or the support of the poor.

[4.] The State is within the declared policy of the Acts. It is the interest of the State to foster the families of the people, to provide for the health and comfort of women and children, to preserve the charities of family life, to maintain the wealth-creating, virtue-engendering and population-increasing power of the homes of the people. This is not the place to enlarge upon the importance of preserving the means of subsistence to women and children, and maintaining the union of the members of families, in a social and economical and monetary point of view. Let it suffice for the stern purposes of judicial opinion, to say that the wealth and population of the State, its peace and order, and the happiness of the people at large, depend, no little, in protecting the small modicum of land, and the little allowance of personal property, given by law to insolvents, from levy and sale to pay taxes. If so, the State is within the policy of these exempting Statutes. She will not defeat her own policy. The Courts of justice will not so construe them as to defeat or weaken that policy.

Upon these points we shall remand this cause; and the other questions, growing out of the application for a new trial, need not be discussed.

Let the judgment be reversed.

No. 14.—WM. HOSKINS, plaintiff in error, vs. THE STATE OF GEORGIA.

- [1.] Offences differing from each other and varying in their punishment, may be included in the same indictment, and tried at the same time, provided they be of the same nature and differ only in degree; as, for instance, the *forging* of an instrument, and the *uttering* and *publishing* it as *true*, knowing it to be *false*.
- [2.] Upon an indictment for forgery, it is competent to prove that the writing was actually passed, for the purpose of establishing the fraudulent intent with which it was made.
- [3.] As a general rule, in a criminal case, the State will not be allowed to reopen the testimony, after the Solicitor General has stated to the Court that the evidence is closed. If, however, this is inadvertently done, and application is immediately made to tender further proof, it may be received, provided, no motion has been made in behalf of the defendant, no evidence introduced, and his witnesses have been discharged in consequence of the declaration.
- [4.] As to the right of the Court to interfere in directing and controlling the litigation before it. *Quere?*
- [5.] To constitute a forgery of an order for the delivery of goods, within the *first* section of the *seventh* division of the Penal Code, it is not necessary that the person whose name is forged, have goods in the hands of the drawee.

Indictment for forgery, in Baker Superior Court. Tried before Judge WARREN, December Term, 1851.

The indictment in this case was for forging an instrument, of which the following is a copy :

“ Mr. Hoarey—Please let William Hoskins have fifteen dollars’ worth in your store, and you will oblige me. October 29th, 1851.
H. W. VINES.”

The first count set forth the instrument, calling it an order, and charged defendant with forging it. The second was similar, except that the instrument was called an order or bill. The third count, was for passing as true, or uttering the forged instrument. The fourth and last count was for having said forged

instrument in his possession, with intent fraudulently to pass the same.

On the trial, counsel for defendant moved the Court to compel the Solicitor General to elect upon which of the counts he would try the prisoner; which motion being overruled, defendant's counsel excepted.

On demurrer to the third and fourth counts for insufficiency, they were stricken out by the Court, and the prisoner put upon trial on the two first counts.

The State proved that defendant wrote the instrument, and then proposed to prove by the clerk of Mr. Hora that prisoner presented it at the store and obtained the amount it called for, in goods and money. Counsel for defendant objected to this testimony, on the ground, that there was then no count in the indictment for "passing" or "uttering" the forged instrument. The Court overruled the objection, and defendant excepted.

The Solicitor General announced that he had closed his case, when the presiding Judge, in the presence and hearing of the Jury, suggested to the Solicitor, "if he had not better offer the order in testimony?" To which proceeding, prisoner excepted, 1st. For irregularity and interference by the Court; and 2d, Because the State had closed, and it was too late to offer other evidence.

When the case was closed, counsel for prisoner asked the Court to charge the Jury, that this indictment could be sustained only under the 9th or 10th section of the VIIth. division of the Penal Code; that it could not be under the 9th, because the instrument was not "a note, bill, draft or check," nor under the 10th, as that section made provision only for such "other writing not herein provided for;" and there was no allegation in the indictment that this was such a writing as was not specially provided for; that the proof made out a different offence from that charged in the indictment, being the offence specially provided for in the 14th section of the same division; and for which offence, prisoner could not be found "guilty under this indictment."

The Court refused so to charge, but on the contrary, charged

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the Jury, "that the indictment was well founded under the said tenth section, without any such allegation as that required by counsel for prisoner; that the indictment was maintainable under the 10th or the 14th section, and the prisoner might be found guilty under either, provided the proof sustained the charge.

To which refusal to charge, and charge as given, defendant's counsel excepted.

R. H. CLARK, for plaintiff in error.

Sol. Gen. LYON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

William Hoskins was tried for the offence of forgery, in the Superior Court of Baker County. The indictment contained four counts: 1st. For *making* a certain forged instrument, therein set forth, called an order; 2d. Substantially the same as the first, except that the writing alleged to be forged, was termed an *order or bill*; 3d. For *uttering or passing* the paper; and 4th, For having the same in defendant's possession with intent fraudulently to pass the same.

Before the indictment was read to the Jury, counsel for the accused moved the Court to compel the Solicitor General to elect upon which one of said several counts he would try the prisoner, which motion was overruled, and this is alleged as error. Counsel for the defendant then demurred to the 3d and 4th counts, as insufficient in law, for a conviction for any offence, which demurrer was sustained by the Court. The indictment was then read, consisting of the two first counts only; the others being stricken out.

[1.] Was the Solicitor General compelled to elect which count he would proceed upon?

In *Bullock vs. The State*, (10 Geo. Rep. 47) this Court held, that where there are several counts in an indictment, charging different grades of the same offence, with punishments differing in degree only, *but of the same nature*, and the Jury return a

general verdict of guilty, the judgment will not be arrested, but the Court will award judgment for the highest grade of offence charged in the indictment.

And such, we understand to be the general tenor of the authorities. *Benjamin Rynders*, of New York, being indicted for forgery, a similar motion was made by his counsel, to the one now under consideration. Chief Justice *Savage*, in delivering the opinion of the Court, said, that there would be an incongruity in incorporating in the same indictment, offences of a *different character*, such, for instance, as forgery and perjury, could not be denied; and that in such a case, a Court would refuse to hear a trial upon both, there could be no doubt. But that, when offences of the *same character*, differing only in degree, are united in the same indictment, the prisoner may, and ought to be tried on both charges at the same time. And such was adjudged to be the case then before the Court. The prisoner was indicted for *forging* the check and also for *publishing it as true*, knowing it to be false. These were admitted to be different offences and were punished with different degrees of severity, but were nevertheless held to be properly united, both in the indictment and the trial. The prisoner might be convicted of one and not of the other. So of murder or manslaughter, of grand and petit larceny, of assault and battery, and an assault with intent to murder; in which cases, no Court would refuse to try the prisoner upon all the offences charged. 12 *Wend.* 425.

But suppose it were otherwise, the two last counts in the indictment being, upon demurrer, stricken out, there was really nothing left but the charge of forgery.

After the witness, George W. Sutton, was sworn, he was asked by the Solicitor General to tell all he knew about the prisoner's having passed to him, as the clerk of Hora, the order alleged to have been forged, and what he gave him out of the store on said order? This question was objected to, because it was intended to elicit testimony to prove that Hoskins had *passed* the instrument, when he was only indicted for *making* it. The objection was overruled, and the interrogatory directed to be answered, and this assigned as error.

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[2.] The order, which is the subject matter of this prosecution, purported to have been drawn by Hiram W. Vines, on a merchant by the name of Hora, requesting the latter to let the defendant have fifteen dollars' worth of goods at his store. The indictment charged, that the forgery was perpetrated with intent to injure the ostensible maker, Vines. A. J. Swinney, a witness previously sworn on the part of the State, testified that he had furnished the accused with the paper upon which this order was written. Now, the evidence of Sutton was competent for the purpose of showing that the order was actually passed, and thereby establishing the *quo animo*, or intent with which it was forged. Besides, by tracing the *custody* of this forged instrument to Hoskins, in connection with the fact that the paper had been supplied to him upon which it was written, it demonstrates the truth of the charge in the indictment, that he was the forger.

Before the Solicitor General had tendered in evidence the order, he announced that he had closed the case, when the presiding Judge suggested to him publicly and in the hearing of the Jury, that he had better offer the instrument in evidence. It was then introduced and allowed to be read, to all of which, counsel for the prisoner excepted.

[3.] We recognize the rule, and are not disposed to relax it, that after the testimony has closed on the part of the State, in criminal trials, that it should not be re-opened. It will not do to allow to any party the right to introduce evidence at any time, at his own election, and without reference to the stage of the trial on which it is offered. It is obvious that by permitting such a practice, the proceedings of the Court would be often greatly embarrassed, the purposes of justice obstructed, and the parties themselves be surprised by evidence destructive of their safety, and against which they could not guard. To prevent such mischievous consequences, all Courts find it necessary to establish some fixed general rules on the subject.

But here the State had not closed; there was the *locus penitentie*. The *intimation* which fell from the Bench, was cotemporan-

eous with the announcement by the State's attorney. Suppose the suggestion had proceeded from the associate counsel, instead of the Court, and when the Solicitor General announced that he had closed, his associate had said, No, we will offer the order first, to the Jury. Would there be any doubt in that case? We apprehend not. The fact that the suggestion came from the Court, can make no difference. No motion had been made, nor testimony tendered on the other side, and the witnesses were not discharged by reason of this declaration.

[4.] As to the right of the Court to interfere in the management of a cause, civil or criminal, in reforming the pleadings and directing the necessary proofs to be adduced; in short, in assuming the general superintendence and control of the litigation before it, it is a point of extreme delicacy with which we are reluctant to interfere. We are not inclined to deny the power, *in toto*; still less, to encourage its exercise. We see nothing in the present case to demand imperatively the corrective interposition of this Court.

[5.] When the testimony had closed on the part of the State, counsel for the prisoner asked the Court to charge the Jury, that this indictment could only be sustained, either under the 9th or 10th sections of the 7th division of the Penal Code; that it could not be sustained under the 9th, inasmuch as the writing charged to be forged, did not answer to the description of instruments designated in that section; that it could not be supported under the 10th, as that only made provision for "such other writings as had not been previously designated," and that there was no allegation in the indictment that this was such a writing as was not otherwise provided for, which averment was necessary; that an offence could not be established under the tenth section, if testimony showed that it was elsewhere provided for, and that it appeared from the evidence, that the offence, if any, came under the 14th section of the division of the Code against forging and counterfeiting, and that consequently, the prisoner could not be convicted at all under this indictment.

The Court declined to make these several charges, but on the contrary, and in lieu thereof, instructed the Jury, that the indict-

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ment was well founded under the 10th section of the 7th division, without any such allegation as that contended for by prisoner's counsel, and that it was under this section that the bill of indictment was preferred. The presiding Judge farther stated, that an indictment, if supported by the proof, was maintainable either under the 10th or 14th sections, and that the prisoner was also subject to indictment and to be convicted under the 14th section, if the proof was sufficient; and that if they believed the prisoner forged the writing in question, they could find him guilty, under the indictment.

Counsel for the defendant excepts, and says that the Court committed error in declining to charge as requested, and also, in the charge as given.

[4.] It is indispensably necessary to a proper understanding of the various points embraced in this last assignment of error, that I should transcribe the 1st, 9th, 10th, and 14th sections of the 7th division of the Penal Code of Georgia.

Section 1st enacts, "If any person or persons shall falsely and fraudulently make, forge, alter or counterfeit, or cause or procure to be falsely and fraudulently made, forged, altered or counterfeited or willingly aid or assist in falsely and fraudulently making, forging, altering or counterfeiting, any audited certificates, or other certificate issued or purporting to have been issued by the Auditor General, or other officer authorized to issue the same, or any order or warrant issued, or purporting to have been issued by the Governor, or the President of the Senate or Speaker of the House of Representatives of the General Assembly of this State, or by any officer of the government, or authorized person, on the treasury of said State, for any money or other thing, or any warrant for land issued, or purporting to have been issued by the Justices of any Land Court, or by any other tribunal, officer or person, authorized to do so within this State, or any certificate, draft, warrant, or order, from any of the public officers of this State, issued or purporting to have been issued under or by virtue of an Act or Resolution of the General Assembly of this State; or any certificate, draft, order, or warrant issued, or purporting to have been issued by any Court, officer, or person authorized to draw on

the treasury of this State, or for public money wherever the same may be deposited; or any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note, or order for money, or goods, or other things of value; or any acquittance or receipt, or any indorsement or assignment of any bond, writing obligatory, bill of exchange, promissory note, or order for money or goods, or other thing or things of value, with intent to defraud the said State, public officer or officers, Courts, or any person authorized, or any person or persons whatever; or shall utter or publish as true, any false, fraudulent, forged, altered, or counterfeited, audited certificates, Governor's, President's, Speaker's, public officer's, Court's, or duly authorized person's, certificate, draft, warrant or order, so as aforesaid issued or purporting to have been issued, or any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note, or order for money, or goods, or other thing or things of value, or any acquittance or receipt for money or goods, or other thing or things of value, or any endorsement or assignment of any bond, writing obligatory, bill of exchange, promissory note, or order for money or goods, or other thing or things of value, with intent to defraud the said State, public officers, Courts, or persons authorized as aforesaid, or any other person or persons whatsoever, knowing the same to be so falsely and fraudulently made, forged, altered, or counterfeited; every such person so offending, and being thereof lawfully convicted, shall be punished by imprisonment and labor in the penitentiary, for any time not less than four years, nor longer than ten years."

SEC. IX. "If any person shall falsely and fraudulently make, forge, counterfeit, or alter any note, bill, draft, or check of, or on, any person, body corporate, company or mercantile house or firm, or purporting so to be; and fraudulently utter, publish, pass, pay, or tender the same in payment, or demand payment of the same, knowing the said bill, note, draft or check, to be forged and counterfeited, or falsely and fraudulently altered, such person so offending, shall on conviction, be punished by confinement and labor in the penitentiary, for any time not less than two nor longer than ten years."

SEC. X. " If any person shall fraudulently make, sign, forge, counterfeit, or alter, or be concerned in the fraudulent making, signing, forging, counterfeiting or altering, any other writing not herein provided for, with intent to defraud any person or persons, bank or other corporate body, or shall fraudulently cause or procure the same to be done, such person so offending shall, on conviction, be punished by imprisonment and labor in the penitentiary, for any time not less than two years, nor longer than five years."

SEC. XIV. "If any person shall designedly, by color of any counterfeit letter or writing, made in any other person's name, or fictitious name, obtain from any person money, goods, chattels or other valuable thing, with intent to defraud any person, mercantile house, or body corporate or company, of the same, such person so offending shall, on conviction, be punished by imprisonment and labor in penitentiary for any time not less than two years, nor longer than seven years."

We agree with counsel for the prisoner, that this prosecution cannot be sustained under the 9th section of the 7th division of the Code, because that applies to *notes, bills, drafts or checks*, and this instrument is neither. And further, we concur with him in holding, that a conviction cannot be had under the 10th section of that division. Not, however, for the reasons that he assigns, that the indictment does not charge that the instrument alleged to be forged, was some "*other writing*," not otherwise provided for by the Code, nor yet, because the offence is provided for in the 14th section of this division. For it is evident that the 14th section does not embrace the crime of *forgery*. But it is an offence expressly included in the 1st section of the 7th division of the Penal Code.

After enumerating a great variety of documents, public and official, which are made the subject matter of forging and counterfeiting the 1st section enacts, that if any person shall falsely and fraudulently make or forge "any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note, or *order for money or goods*, or other thing or things of value, with intent to defraud any person whatever, any such person so offend-

ing, and being thereof lawfully convicted, shall be punished by imprisonment and labor in the penitentiary, for any time not less than four, nor longer than ten years." *New Digest*, 800, 801.

Mr. Clark contends, that admitting the paper to be an order for the delivering of fifteen dollars' worth of goods, that it is not an order of the kind intended by this section; that it has long been settled in England upon a similar Statute, that the order within the purview of the Court, must be one imparting a *right* on the part of the person who is supposed to have made it, and a *duty* on the part of the person on whom it is made; that where it seems to leave compliance or refusal *optional*, and applies rather to the *favor* than the *justice* of the person on whom it is drawn it is not within the Statute as not being an order on which the party taking it can place any reliance; that it is the usurpation of another's right, which the Legislature intended to punish and prevent.

That this ingenious distinction is supported by authority, we cannot deny. 1 *Leach*, 111, note. *Ib.* 134. *Ib.* 365. 2 *Leach*, 615. *Mitchell's case*, *Foster*, 119. 3 *Chitty's C. L.* 1033. Indeed we are constrained to admit that the Statute of 7 *Geo. II.* c. 22, of which that portion of ours upon which I am commenting, is almost a transcript, repeatedly received the construction in the British Courts which is claimed by counsel, and that the decisions have been uniform to that effect, and are so recognized by standard writers on the Criminal Law of that country.

But the strict construction adopted in relation to this English Statute, never has obtained in the American Courts. It was enforced in New York, and the Legislature amended the Act so as to extend to orders purporting to be made without, as well with, right or authority in the person whose name may be forged. *The People vs. Thompson*, 2 *Johns. Cases*, 342.

It arose wholly in the mother country from the penalty which was to follow a conviction, viz: death; and to apply it under our Code, which is not only mild in its punishments, but which declares that any indictment shall be deemed sufficiently technical and correct, which states the offence so plainly, that its nature may be easily understood by the Jury, would be to thwart

the designs of the Code. The word "order," is in daily use all over the land, and its meaning well understood. We send *orders* to tradesmen, by our children, servants and neighbors, and through the mails, for merchandise, without ever supposing for a moment, that we possess the power to compel their compliance. It is a mere *request*, and nothing more. We are clear, therefore, that this case is within the mischief intended to be prevented, as well as within the language of the 1st section of the 7th division of the Code.

Counsel for the prisoner further insists, that the offence proven, if any, fell within the 14th section, as heretofore cited, and consequently, was not embraced within the 10th section, as ruled by the Court. The Circuit Judge admitted, and so charged the Jury, that an indictment might be framed under this section and a conviction had, provided the necessary proofs were made; and in this we think he was right.

The learned counsel is both right and wrong, in respect to his position. *Hoskins* having obtained from *Hora* money and goods by color of this forged writing, made in the name of *Vines*, is unquestionably liable, under the 14th section, for that offence. But it is not true, that he could be convicted under that section for the crime of forgery. Obtaining goods on false writings is one offence; forgery is another, and altogether different offence. And we are all satisfied that the Jury, who are made the judges of the law as well as of the facts, are fully warranted in returning a verdict of guilty against the defendant, within the 1st section of the 7th division of the Penal Code, upon which we must presume the indictment was framed.

The judgment against the prisoner must consequently stand affirmed.

No. 15.—**CHARNER B. STRANGE** and others, plaintiffs in error,
vs. **WILLIAM BELL**, defendant in error.

- [1.] Where, by an Act of the Legislature, certain commissioners were authorized to assess the damages which the owners of town property might sustain by the removal of the county site : *Held*, that such commissioners had no jurisdiction to try the question of title to land—under the Constitution, that jurisdiction being vested in the Superior Court.
- [2.] Where two or more persons claim the same thing, by different or separate interests ; and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them.

In Equity, in Marion Superior Court. Decision on demurrer,
by Judge **IVERSON**, September Term, 1851.

The General Assembly of 1847 passed an Act, among other things, to provide for the location of a new County site, in the County of Marion, and to compensate the owners of lots at the old site (Tazewell) for the depreciation of their real estate, by reason of the removal. Under this Act, commissioners were appointed to assess the amount of depreciation, who, under the Act, were required to issue certificates to the owners, of the amount ascertained ; and the County Treasurer was required to pay to the holders of these certificates, the amount thereof, without farther order.

William Bell, the County Treasurer, filed his bill of interpleader, against **Charner B. Strange** and **William Wells**, alleging, that upon a certain house and lot, known as the Village Hall, there was assessed by the commissioners as loss, the sum of \$757, to which sum, said **Strange** and **Wells** each claimed a certificate, as the true owner of the property. The commissioners issued the certificate to **Strange**, but at the same time issued to **Wells** a certificate for \$228, being fifty-seven per cent. (the rate adopted by the commissioners,) upon \$400, being the amount of **Wells'** interest in the property, as returned to the 'Tax Receiver by him. The bill alleged that **Strange** had

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obtained a mandamus *ni si* against complainant, to compel him to pay over the sum specified in the certificate to him, which was still pending; and that Wells had employed counsel, and was preparing also to prosecute, not only this claim on the certificate to him for \$228, but also for the whole amount of depreciation assessed by the commissioners upon the Village Hall. The bill farther alleged that the \$228 allowed to Wells, had been previously included and allowed by the commissioners, in the certificate granted to Strange; and that, under these circumstances, the complainant could not safely pay over the amount of the assessment without the direction of the Court. The prayer was for an injunction to restrain Strange and Wells from prosecuting their claims against complainant, and that they be compelled to interplead, and the rightful owner be decreed by the Court, to receive the fund in the hands of the complainant.

Strange, by his counsel, demurred to this bill, for want of equity. The Court overruled the demurrer, and this decision is assigned as error.

B. HILL and E. H. WORRILL, for plaintiff in error.

W. WILLIAMS, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

The complainant, who is the County Treasurer of Marion County, filed his bill of interpleader, in the Court below, alleging that Strange and Wells both claim to be the owners of the "Village Hall," in the town of Tazewell, and both claim from him the payment of the damages assessed by certain commissioners, under the Act of 1847, on account of the removal of the County site from the Town of Tazewell.

[1.] By the 7th section of the Act of 1847, it is provided that five commissioners should assess the damages sustained by the owners of town property, in the Town of Tazewell, on account of the removal of the County site, the same to be fixed at the amount the owners thereof placed upon it, in their re-

turns of taxable property, for the year 1847, and execute to the *owners* of said town property, a certificate declaring the damage thus sustained, which certificate shall become a debt against the County Treasurer of said County, &c. Strange obtained a certificate from the commissioners, that he had been damaged by the removal of the county site \$757, as the owner of the "Village Hall."

When a branch of this case was before us on a former occasion, we held, that the certificate of the commissioners was conclusive upon the County Treasurer, as to the amount assessed by them to be due, and that the same was a debt due against the County, which he could not question. *Bell vs. The State*, 9 Geo. Rep. 390. The County Treasurer does not now question the amount of the assessment or the validity of the debt, but asks to be protected in making payment of that debt; alleging that he is in danger of being hurt or injured, if he pays it to Strange, who is the holder of the certificate. The defendants demur to the bill, and insist that inasmuch as it appears on the face of it, that Wells urged, before the commissioners, that he was the owner of the "Village Hall" and that they considered and rejected his claim of ownership, and granted the certificate to Strange that he is now *concluded*, by the judgment of the commissioners, from asserting his right of ownership to the property; that if he was dissatisfied with the decision of the commissioners, he ought to have sued out a writ of *certiorari*; and had the judgment of the commissioners reversed, if erroneous. The answer is, that the Legislature intended to compensate the *owners* of town property in Tazewell, but made no provision, as to the mode of trying the title to the property, in case of a dispute in relation thereto. The commissioners had no jurisdiction to hear and decide the question of *title* between Wells and Strange. The jurisdiction to try the question of title to land, is vested, by the Constitution, in the Superior Court. Hence, the judgment of the commissioners, granting the certificate to Strange, did not *conclude* Wells from asserting his ownership to the property; and if he was, in fact, the *real owner* of the property, he is entitled to the damages, notwithstanding the certificate of the

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commissioners. With regard to the *certiorari*, which Wells might have sued out, we have only to say, that if it had been sanctioned and sustained, and a new trial ordered before the commissioners, to try the question of ownership to the land and its appurtenances, such order of the Superior Court would have been mere *brutum fulmen*—the commissioners having *no jurisdiction* to hear and determine that question, under the provisions of the Constitution.

[2.] When two or more persons claim the same thing, by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. 1 *Smith's Chan. Prac.* 468. *Story's Eq. Plead.* 237.

The bill of interpleader is equally proper, though the party be not actually sued, or be sued by one of the conflicting claimants only, or though the claim of one defendant be actionable at Law, and the other in Equity. *Richards vs. Salter*, 6 *Johns. Chan. Rep.* 447. *Angell vs. Hadden*, 15 *Vesey*, 244. In our judgment, the complainant makes out a proper case for a bill of interpleader, and there is no error in the Court below in overruling the demurrer.

Let the judgment of the Court below be affirmed.

No. 16.—EDWIN A. ADAMS *et al.* plaintiffs in error, vs. WILLIAM MIZELL, defendant in error.

[1.] A defendant, coming into possession of slaves as a loan, after the death of the lender, and with knowledge of the title to the plaintiff, derived by will from the lender, asserts title to the slaves and declares that he will hold them in spite of them: *Held*, that this, coupled with user and acts of control, is a conversion

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Trover, in Talbot Superior Court. Tried before Judge IVERSON, September Term, 1851.

Edward A. Adams and wife and others, the children of Louisa Mizell, brought an action of trover against William Mizell, for a negro woman, Rose, and her descendants. The plaintiffs below claimed under the will of Allen Dorman, the father of Louisa Mizell. They proved, upon the trial, that about one year after the marriage of defendant below, with Louisa Mizell, about 1818, Rose was sent home with them by Allen Dorman, to be well treated until he called for her, saying that he would not give her to them to spend, but to keep until he called for her. That defendant had been in possession of the negro and her descendants ever since; always claimed them as his own, and worked and treated them as owners of slaves usually do. One of the witnesses had a conversation with defendant sometime before the commencement of this suit, about a threatened suit, by one of the plaintiffs, in which conversation defendant stated, that "he knew that Allen Dorman had given said negroes to his (defendant's) children in his will, but that they were his and he should hold them in spite of them."

Defendant's counsel moved for a non-suit, on the ground that there was no proof of a conversion. The Court granted the motion, and entered a non-suit, and this decision is here assigned as error.

B. HILL and E. H. WORRILL, for plaintiffs in error.

L. B. SMITH, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] According to the evidence, the defendant received the negroes as a loan for an indefinite term. After his marriage with the mother of the plaintiffs, the woman, Rose, was sent home with him by his father-in-law, under whose will the plaintiffs claim, "to be well treated until he called for her," he

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saying farther, "that he would not give her to them to spend, but to keep until he called for her." The evidence farther is, that the defendant had been in possession of Rose and her descendants ever since; always claimed them as his own, and worked and treated them as owners of slaves usually do. It is farther in evidence, that one of the witnesses had a conversation with the defendant before this suit was instituted, about a threatened suit by one of the plaintiffs, in which defendant stated, that "he knew that Allen Dorman had given the negroes to his (defendant's) children in his will, but that they were his, and he should hold them in spite of them." Upon this evidence, the Court non-suited the plaintiffs, because there was no proof of conversion, and they have excepted. The user and control of the slaves alone do not amount to conversion, because consistent with the lender's title, according to the right of possession, which the defendant acquired by the loan. There was nothing in them tortuous. But the assertion of a title to the property, made after the death of the lender, with knowledge of the plaintiffs' title, and made in direct reference to their title, and a declaration that he would hold it, in spite of them, in addition to the use and control, is proof of conversion. The defendant negatived both the right of property and right of possession of the plaintiff; repudiated the character in which he acquired the possession, and appropriated the property. These things constitute conversion, and the evidence proves them. The case, in our opinion, ought to have gone to the Jury. *Liptrot vs. Holmes*, 1 *Kelly*, 391, '2.

Let the judgment be reversed.

NO. 17.—FRANCES LENNARD, plaintiff in error, vs. THOMAS BOYNTON, defendant in error.

[1.] One to whom a slave is hired for a year, is entitled to no abatement of the price because of the death of the slave after the commencement of the term.

Assumpsit, &c. in Talbot Superior Court. Decision by Judge IVERSON, September Term, 1851.

Thomas Boynton brought suit against Frances Lennard, on a note for \$100, given for the hire of a negro, for the year 1850, and payable to Rebecca Boynton, or bearer.

Frances Lennard pleaded that the negro died on the 1st May, 1850, and that the note was transferred to Lennard on 1st February, 1851, after it was due, and with notice of this defence.

On motion, the Court below struck out this plea, and this decision is assigned as error.

E. H. WORRILL, for plaintiff in error.

B. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, whether, when a negro is hired for a year, and he dies within the time, the hirer should be allowed a credit upon his note, from the time of the negro's death to the end of the year, for so much as the hire for that time would amount to?

In Scotland, France, Canada, Louisiana, and indeed all those countries where the Civil Law obtains, it is probable that the hire would be apportioned. In South Carolina, where the Common Law has never been adopted throughout, as the basis of their jurisprudence, the same doctrine obtains, and the Courts of that State apply the same principle to real estate. *Ripley vs. Wightman*, 4 McCord's R. 447.

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In Virginia, it has been held, that if a slave who is hired for a year, be *sick*, or *run away*, the *tenant* must nevertheless pay the hire; but if the slave *die* without any fault in the tenant, the *owner* and not the *tenant*, should lose the hire from the death of the slave, unless otherwise agreed upon. *Gurge vs. Elliot*, 2 *Hen. & Munf. R.* 5.

The reason given by Chancellor *Taylor* is, that pursuing this rule, the act of God falls on the *owner*, on whom it must have fallen if the slave had not been hired. *Non constat!*

And the Court of Appeals of South Carolina, seem to consider this decision and the previous ruling of their own, in *Ripley vs. Wightman*, that if a man lease a house for a year, and during the time it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied, as decisive of the question, that where a slave hired for the year, dies within the year, his wages should be apportioned. *Bacol vs. Panell*, 2 *Bailey's R.* 424.

The Supreme Court of Missouri had occasion to consider this point, in *Dudgeon vs. Teap*, (9 *Missouri R.* 867,) and while they adhere to the decision of Chancellor *Taylor*, and which seems to be authority for all the subsequent adjudications upon this subject, they state distinctly, that if the analogies of the law on the subject of *rents* be adhered to with strictness, that this doctrine cannot be sustained. And so we think.

If natural justice requires that rent ought to be abated or apportioned, because the thing to be enjoyed be entirely lost or taken away from the tenant, it would be unreasonable to allow the owner hire for a "*dead negro*."

But we apprehend the principle to be now well settled that where the lessee covenants to pay rent, he is bound to pay it, whatever injury may happen to the demised premises; and that if the tenant would guard himself against loss by fire and tempest, he must introduce into his lease an exception to this effect. *Paradine vs. Jane*, *Aleyn R.* 27. Cited per Lord Ellenborough, *C. J.* 10 *East*. 533. *Argument, Brecknock Company vs. Prichard*, 6 *T. R.* 751. Recognized per Lord Kenyan *C. J.* lb. 752. *Wood. L. and T.* 5th ed. 471, 418. *Belfleur vs. Western*, 1 *Term*.

Rep. 312. *Monk vs. Cooper*, 2 *Lord Raymond*, 1477. *Carter vs. Cannius*, 1 *Ch. Cases*, 83. 2 *Vernon*, 280. 1 *Fonbl. Eq.* 378, 379, and the authorities there cited.

This is no longer an open question with this Court, as to *real estate*. In the well-considered case of *White vs. Molyneux*, (2 *Kelly's R.* 124) we held, upon a full review of all the authorities, that in case of express contracts to pay rent, the destruction of the premises by fire, or violence, or any casualty whatever, is not a good defence to an action to recover the rent, unless there is an express stipulation to that effect; and that a Court of Equity could not relieve against such contracts, under such circumstances.

With that opinion, supported as it is by an overwhelming weight of authority, we have no reason to be dissatisfied. Independent of precedents, and if this were a case of the first impression, why I ask, should not a party who, by his contract, creates a duty or charge upon himself, be bound to make it good, notwithstanding any accident by inevitable necessity?

But it is said, that it would be unreasonable that these things which are inevitable by the act of God, which no industry can avoid, nor any policy prevent, should be construed to the prejudice of any person in whom there was no laches. 1 *Rep.* 97. And the maxim of the Common Law, *actus Dei nemini facit injuriam*, is invoked in aid of the defence set up to the recovery of this hire.

How far this principle was justifiable in adjudging emblements to those who had an uncertain interest in lands, which was determined between the period of sowing and the severance of the crop, I will not undertake to say. That the rule, like many others respecting real estate, was introduced to favor the landed aristocracy of England, by encouraging husbandry and preventing the ground from remaining uncultivated, is obvious enough.

But where it is assumed as the ground for a legal judgment, that the dispensation of Providence shall prejudice no one who is guilty of no default on his part, I beg leave to demur to the proposition. Not to adduce innumerable other illustrations, I will refer to one only, which is directly in point. Negroes were

hired at the beginning of last year, owing to the high price of cotton and other produce, at the most extravagant rates, throughout the State. Owing to the unparalleled drought in the middle countries, the failure in the crops was almost entire. Is not this *actus Dei*, in withholding the early and the latter rain? No laches is attributable to the hirer. If the death of the negro would entitle him to relief, why should not this other Providential visitation? In our judgment, neither should. He hired the slave for the year, *unconditionally*. He must comply with his engagement.

The one view of this matter is simple and intelligible; it is neither more nor less, than the coercion of the party to fulfil his contract. The other is vague and fluctuating, because it rests on no solid foundation. For I speak with reverence, when I say that the acts of God, by hail, drought, inundation, pestilence, tornado, and the ten thousand judgments, public and private, by which he afflicts for their good, the children of men, prevent the fulfilment of more contracts, than all human misconduct put together.

Suppose it were otherwise, why should the loss fall exclusively upon the owner of the reversion or fee? Is it not enough that he is deprived of his property? And is not the hirer the *quasi* owner for the time being? Does he not take the risks for the year, unless he stipulates against them? Does he pay a premium by way of addition to the price of hire, for life insurance? If not, why give him virtually the benefit of such a policy? Why tax the owner with it, when he is paid nothing for it? He agrees to take the value of the servant's labor merely; and if he is to be considered as having insured his life, he should be compensated for the risk.

The uncertainty of the negro's life was equally well known to both Boynton and Lennard, when the contract for the hire was entered into between them. They were capable of making their own agreement, and in the way most acceptable to themselves. What power has any Court to modify or change their contract? When the slave was delivered, the contract was executed by the owner. His part of it was performed. Lennard

expressly stipulated to pay the hire; and however hard it may be upon him to pay wages for services which cannot be rendered, let it be kept in mind that he brought this hardship upon himself. It was his own voluntary act, and he has no claims upon the justice of the Courts to be relieved.

Apart from the principle involved, motives of public policy forbid a rescission of this contract. Humanity to this dependent and subordinate class of our population requires, that we should remove from the hirer or temporary owner, all temptation to neglect them in sickness, or to expose them to situations of unusual peril and jeopardy. We say to them, go, and they must go; stay, and they must stay; whether it be on the railroads, the mines, the infected districts or any where else. Let us not increase their danger, by making it the interest of the hirer to get rid of his contract, when it proves to be unprofitable. Every safeguard, consistent with the stability of the institution of slavery, should be thrown around the lives of these people. For myself, I verily believe, that the best security for the permanence of slavery, is adequate and ample protection to the slave, at our own hands.

Slavery not being tolerated in England, no case precisely in point could be found in the Reports of that country. In our judgment, however, the case of rent for demised premises and that of the hire of negroes, is not only strikingly, but strictly analogous. One is compensation for the use of houses and lands, the other for slaves. And if the Courts will not relieve the tenant from the payment of rent, when the demised premises is destroyed by casualty, and we have held that they could not, still more emphatically does policy at least, if not principle, forbid relief against the hire of a negro who has died before the expiration of the term. We have great respect for the distinguished Chancellor of Virginia, who decided differently, and for the very able tribunals in our sister States, who have subscribed to the doctrine thus established. Entertaining a contrary view of this question, both upon principle and policy, we cannot interfere to discharge Mr. Lennard from his undertaking, fairly and freely made, however hard it may appear.

The judgment of the Circuit Court must be affirmed.

No. 18.—RICHARD R. RESPASS, plaintiff in error, vs. JOHN YOUNG, defendant in error.

[1.] In an action of trover, for the recovery of a slave, alleged to have been *loaned* by a father to his daughter, and the evidence was conflicting, as to whether it was a *gift* or a *loan* of the slave in controversy: *Held*, that on the trial, it was the duty of the Court, to have instructed the Jury what the law required to constitute a valid *parol gift* of the slave in question; and also, what the law denominates a *loan* of the slave, and then to leave the Jury to decide, from the whole of the evidence, whether it was a *gift* or a *loan*; and that it is error for the Court to express any opinion to the Jury, as to whether the evidence proves a *loan* of the slave or a *gift*; but that the question of *loan* or *gift*, is *exclusively* for the consideration of the Jury, from the whole of the evidence submitted.

Trover, in Marion Superior Court. Tried before Judge IVERSON, September Term, 1851.

This was an action of trover, brought by John Young against Respass, for a negro girl named Ann. The defendant below claimed the negro as a purchaser, from Eason Joiner, the son-in-law of Young, and to whom the defendant alleged a gift of the negro. Upon the trial of the case, it was proved by Marion Young, that in 1841, his father told him to take the girl, Ann, to the house of James West; that he carried her as far as Hardy Hunter's, where his sister was, and left her there, but shortly afterwards, she was at the house of West, but how she got there witness did not know. Jas. West proved, that in 1839 or 1840, Mrs. Joiner, then a girl about sixteen years old, came to his house and asked him if he would take the girl, Ann, and keep her for her victuals and clothes; that he agreed to keep her on those terms, and did keep her under that agreement nearly two years; that during that time, Young, the plaintiff, visited his house several times, and did not claim the girl; he saw her, but said nothing about her. Miss Young claimed the girl, and witness held her as the property of Miss Young; that in 1841 or 1842, Miss Young married Eason Joiner; that they went to house-keeping in about a month afterwards, and took the girl

Ann, from his house, home with them ; and that Young visited his daughter frequently after her marriage. The depositions of Hardy Hunter were offered in evidence, stating, among other things, "that Mrs. Joiner requested him to see her father and get him to let her have the girl, (Ann) to wait on her ; that he went to see Young, who consented, under the condition that the negro was to be returned when called for. In 1847, Young called for the girl, and she was delivered to him. Young afterwards let Mrs. Joiner carry the girl home again, but witness did not know the conditions ; *but he never understood it as a gift.*" To that portion italicized, counsel for Respass objected. The Court admitted the evidence, and this is the first error assigned.

The depositions of Dolly Hunter were also offered in evidence, stating, "that Mrs. Joiner requested her to get her father to let the girl, Ann, come and wait on her ; that she got the girl and brought her to Mrs. Joiner ; and that she (witness) and her husband pledged themselves to return the girl when Young should call for her ; Young called for the girl and she was returned to him ; she understood the girl to be a loan, and as far as she knew, Young always reserved the right to take back the girl when he pleased."

Counsel for Respass objected to all of this deposition, which, being overruled by the Court, error has been assigned upon this decision.

A great deal of testimony was submitted to the Jury, which it is unnecessary to repeat. Among other things, it was proven, that Young, at one time, demanded the negro of Joiner, who refused to give her up. A quarrel ensued, in which Joiner told Young there was a law and to go to it, whereupon Young said he would not go to law ; that Mrs. Joiner might have the girl.

The Court charged the Jury, that "if Young demanded the girl of Joiner, and he refused to give her up, but told Young there was a law and to apply to it, and Young said, rather than go to law, he might have the negro, this was no evidence of a gift." To this charge Respass excepted, and has assigned error thereon.

The Court farther charged, that "if Young put the negro

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into the possession of his daughter as a loan, to be returned to him when called for, and then took the girl back into his possession, and in this way the girl repeatedly passed from Young to his daughter, and then back to Young; and after this, Young allowed the girl to go into the possession of his son-in-law, without explanation or qualification of the possession, the same did not amount to evidence of a gift; but the law would presume it was a transaction similar to those that had previously occurred."

This charge also is assigned as error.

WORRILL, and B. HILL, (representing W. D. ELAM,) for plaintiff in error.

E. R. BROWN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The first ground of error assigned in the record, is the admission in evidence of that portion of Hardy Hunter's testimony, in which he stated, that "Young afterwards let Mrs. Joiner carry the girl home again, but did not know the conditions; *but he never understood it as a gift.*" The objection is, that the witness never "*understood it as a gift.*" The amount of this evidence is, that the witness did not *know* whether the negro went into the possession of Joiner and wife, the second time, as a gift or a loan; he says he did not *know the conditions* on which she went into their possession, but never understood it as a gift. This portion of the evidence proves nothing; it is entirely *negative* in its character, and could not have influenced the mind of the Jury either way, on this point. We affirm the judgment of the Court below, on the ground that it did not *prejudice* the rights of the defendant. The fact that the witness never understood it as a gift, did not alter or change the *legal effect* of the transaction.

The same remarks are applicable to that portion of the testimony of Dolly Hunter, which was excepted to on the trial. At

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ter proving a loan of the girl, Ann, by the plaintiff on one occasion, after the marriage of Mrs. Joiner, she states that the girl was returned to Young, on his calling for her. The witness appears to have been the friend and agent of both the parties, in regard to the particular transaction. The witness *proved a loan of the negro*, and further states, she "understood it to be a loan, and as far as she knew, Young always reserved the right to take back the girl."

Her *understanding* evidently relates to the particular transaction, in regard to which, she acted as the *agent* and friend of all the parties. We therefore overrule this exception.

[1.] The main question made by the record, is in regard to the charge of the Court to the Jury. The point in controversy between the parties was, whether the girl, Ann, went into the possession of Mrs. Joiner and her husband, as a *gift* or as a *loan*. In regard to this question, the evidence is conflicting.

There is, undoubtedly, evidence in this record, from which the Jury might legally have presumed a gift of the girl, Ann, by Young to his daughter. Marion Young states, that in 1841, his father, the plaintiff, told him to take the girl to the house of James West; that he carried her as far as Hardy Hunter's, where his sister, Mrs. Joiner, then was, and left her; that shortly afterwards, the negro was at the house of James West, but how she got there, witness did not know.

James West states, that in 1839 or 1840, Mrs. Joiner, then a girl about sixteen years old, came to his house and asked him if he would take the girl, Ann, and keep her for her victuals and clothes; that he agreed to keep her on these terms and did keep her, under that agreement, in his possession for almost two years; that during the time the negro was at his house, the plaintiff visited him several times; saw the negro there, did not claim her, nor say anything about her. Witness held the negro as the property of Miss Young; that she claimed her as her property; that in 1841 or 1842, Miss Young married Eason Joiner; that they went to house-keeping in about a month afterwards, and took the girl, Ann, from his house home with them; that the plaintiff visited his daughter frequently after her marriage,

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and within a short time thereafter. Hardy Hunter and Dolly Hunter prove a loan of the girl to Mrs. Joiner after the marriage; but at what time, the record does not state. This loan was on condition that the girl was to be returned when the plaintiff called for her; that the plaintiff did call for her in 1847, and she was returned to him; that Young, the plaintiff, *let Mrs. Joiner carry the girl home with her again, but witness did not know the conditions on which the girl went to Joiner again, but never understood it as a gift.*

John Fulwood states, that Joiner had the girl in possession about eight years; that he heard the plaintiff tell Mrs. Joiner she might have the girl, Ann, and he would not go to law for her; this was at Joiner's house. *On the next day he heard Young again tell Mrs. Joiner she might have the girl.* Here it is important to note the fact, that it was in the *first* conversation that Young told his daughter she might have the girl, and that he would not go to law for her; but in the conversation stated on the *next day*, nothing was said by Young about *the law*, but told his daughter *she might have the girl*. In view of the evidence contained in this record, a due regard to the rights of the defendant required, in our judgment, that the Court below should have instructed the Jury, as to what the law required, to constitute a good parol gift of the slave in question, and also, what the law denominates a loan; and then to have left it to the Jury, without any expression of opinion, whether the evidence of Fulwood, or that of the other witnesses, established a gift, or loan of the slave to Mrs. Joiner. The Jury would have been authorized to have presumed a gift of the slave by Young to his daughter, from the evidence of West; also, from the evidence of Hardy Hunter, that the negro went into the possession of Joiner and wife, *after she had been returned, without any conditions*, so far as the witness knew; also from the evidence of Fulwood, that Young said his daughter might have the negro, on the *next day* after the *first* conversation proved by him—the negro then being in the possession of Joiner and wife. *Teague vs. Griffin*, 2 Nott & McCord, 93. *McCluney vs. Lackhart*, 4 McCord's Rep. 251. If the Jury had found in favor

of the gift, we should have refused a new trial, on the ground that such a verdict had been rendered, *without evidence* to support it. So, if the Jury had found, as they have done, against the gift, without any expression of the Court, as to the *sufficiency* of the evidence to establish the gift, and the question of gift or a loan had been fairly submitted to the Jury upon the *whole evidence* contained in the record, we should not have granted a new trial.

There is evidence in the record, from which the Jury might have presumed a *gift* of the slave; there is also evidence in the record from which the Jury might have presumed a *loan* of the slave. The *facts proved*, as well as the *credibility* of the witnesses, were *exclusively* for the consideration of the Jury. In our judgment, the Court below erred in expressing any opinion as to whether any portion of the evidence submitted to the Jury, made out a *gift* or a *loan* of the slave. Had a *gift* or a *loan* of the slave been *proved* under the law? was *the question* for the Jury to decide, upon the *whole of the evidence submitted*. See the Act of 1850. *Cobb's New Digest*, 462.

Let the judgment of the Court below be reversed.

No. 19.—JOHN K. JONES, plaintiff in error, vs. GREEN B. SCOGGINS, defendant in error.

[1.] When a plaintiff in ejectment relies upon possession alone for a recovery, and the defendant shows possession in himself, *bona fide* acquired, he can defeat the plaintiff's recovery, by showing title in a third person, or by showing that the plaintiff has parted with his interest in the land, by transferring a bond which he holds for titles, to a third person. *Aliter*, if the defendant came into possession as a trespasser.

Ejectment, in Talbot Superior Court. Tried before Judge IVERSON, September Term, 1851.

This was an action of ejectment, brought by John K. Jones, against G. B. Scoggins, for one and one-fourth acres of land. The plaintiff relied upon a prior possessory title, and on the trial proved that he had been in possession for three years, of the premises in dispute, and that defendant obtained possession from one Hollis, who obtained possession by a forcible entry on the premises. The defendant sought to protect himself, by showing title in Hollis, his landlord. The Court charged the Jury, "that where a party in an action of ejectment, merely relies on possessory title, the defendant could defeat his right of recovery by showing title in some third person." To which charge Jones excepted.

John K. Jones held a bond of Mulford Jones to make titles, to one-half of lot No. 19, 17th district Talbot County, (the premises in dispute being a part of this lot) without specifying which half. This bond was in evidence, and on it was endorsed a transfer to Snow W. Boynton. The Court charged the Jury, "that if they believed the premises in dispute were included in the bond exhibited, that the plaintiff had transferred that bond to Boynton, then he had parted with all the right and title he had to the premises, and they must find for the defendant."

To which charge Jones excepted. Upon these exceptions error is assigned.

E. H. WORRILL, for plaintiff in error.

L. B. SMITH, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The evidence is not very fully set forth in the Reporter's brief, and for the sake of perspicuity, I state, that it does not appear from the evidence that the plaintiff ever bought the acre and a quarter of land in controversy; on the contrary, it is in evidence, that the land at the time he bought the one-half of lot No. 91, was claimed by his brother, who sold this one-half to

him, and that his brother put him in possession of this acre and a quarter, as a matter of accommodation. Thus acquiring possession, the plaintiff held it for three years, and removing into an adjoining County, locked the doors of the houses on the premises and left the keys with one Harris, a neighbor, with instructions to take care of the property. This is the plaintiff's case. Upon possession thus acquired, he relied for recovery. The defendant showed a title in one Hollis, by deed from the grantee of the land; also, the grant from the State to the original drawers of the lot, a part of which, is the small parcel of land in litigation. The defendant farther showed, that shortly after the plaintiff removed, Hollis put him in possession, as his tenant. But it appeared also, that this was done under the following circumstances. Hollis and the defendant, Scoggins, went upon the premises and tore down the houses, being forbid to do so by Harris, the plaintiff's agent, and immediately then and there, Hollis directed the defendant to take possession, which he did. Under this state of the facts, the Court ruled, that the defendant might defend by showing title in a third person; and to this charge, the plaintiff in error has excepted.

It is true, that the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, and hence it is a general rule, that the defendant may defeat his recovery, by showing an outstanding title in a third person. But if the plaintiff, as in this case, relies upon possession acquired *bona fide*, and nothing else, and the defendant is in possession as a trespasser, the defendant cannot rely upon that tortious possession, nor can he protect himself by showing a title in a third person. The law will not permit him to take any thing, or any account, by his trespass. Thus, I apprehend, is briefly stated the whole doctrine upon this subject. *Jackson ex dem. Duncan and others vs. Harden*, 4 Johns. R. 202. 6 Wend. 671. 7 Cow. 187. *Ib.* 643. 5 Geo. R. 39. 2 Johns. R. 22. 10 *Ib.* 337. The Court held, that the defendant in *this case*, might show title in a third person. The charge is to be taken in reference to the facts proven. If the defendant came into possession as a trespasser, the charge was erroneous, but

if he came in under Hollis, although without a paper title from Hollis, the charge was right. Once having shown his tenancy under Hollis, it was competent for him to defeat the plaintiff's recovery by showing Hollis' title. Now, as the evidence shows that Hollis did in fact put him in possession, we must infer that the Court meant to instruct the Jury, that the defendant being in possession by Hollis' authority, he might rely upon Hollis' outstanding title to defeat the plaintiff's right, by prior possession. The Court was not called upon to instruct the Jury particularly as to the rule, where the defendant is a trespasser. Whether he was or not, under all the circumstances of this case, having entered on the premises with Hollis, and aided in his taking possession by violence, or whether the plaintiff had abandoned the possession without a mind to return, are questions about which, no legal rule was laid down by the Court, and about which we have, therefore, no occasion to say anything farther.

The defendant also read in evidence, a bond for titles, from Milford Jones to the plaintiff, for one-half of lot No. 91, which did not express which half of that lot was to be conveyed. The plaintiff bought the *north* half of lot No. 91, as his vendor, the obligor in this bond, testified, and did not buy the *modicum* in controversy, that being part of the south half. Upon this bond was a transfer to one Boynton, by the obligee, the plaintiff in the action. In reference to this bond, the Court instructed the Jury, "that if they believed that the premises in dispute was embraced in it, and that the plaintiff had transferred it to Boynton, then he had parted with all his right to the land, and they should find for the defendant." This charge is excepted to. It is to be inferred from all the evidence, that this bond did not embrace the portion in litigation, but as it was itself silent as to which half of lot No. 91 it contemplated, and the plaintiff set up a claim to a part of one of the halves, to wit: the south half, and that part of the south half was also claimed by defendant, there was some vague ground to infer that the part in litigation was embraced. It was not, therefore, wholly a hypothetical charge. Whether it was so embraced, the Court left to the Jury. But it

is said that the transfer did not legally show that plaintiff had no title, and defendant could not defend upon this ground. If, as in the former case, the defendant was not a trespasser, but had shown a *bona fide* possession, we are not prepared to say but that he might defeat the plaintiff's recovery, by showing that he had transferred in this way his interest in the premises, to a third person. If the plaintiff had relied upon this bond as a part of his title, as the origin, for example, of his possessory right, I do not see but that proof of a transfer of the bond would break down his claim by possession. Whether he did, or not, transfer his interest in the bond, was left to the Jury.

Let the judgment be affirmed.

No. 20.—WALLER D. WHALEY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

- [1.] When a Juror has been put upon triors, and they have retired to make up their verdict, it is not proper to move the Court to send written instructions to the triors, to propound to the Juror a particular interrogatory, for the purpose of establishing his disqualification. The proper course is to have the triors brought into open Court, and instructed publicly and in the presence of both parties, touching the whole matter.
- [2.] It is admissible for a witness to state, that he was induced to waylay a party suspected of a design to commit a felony, from information derived from a negro.
- [3.] As a circumstance of guilt, it is competent to prove that the defendant offered to bribe one of his guards, in order that he might effect his escape.
- [4.] While it is not right to encourage one citizen to tempt another to the commission of a crime; yet, when the initiatory steps have been already taken, it is excusable to connive at conduct which will lead to the detection of the offender.
- [5.] Notwithstanding a witness may testify that the confessions of the prisoner were made under threats, still the Court may inquire what those threats were, in order to ascertain their sufficiency in law, to exclude the confessions.

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[6.] An illegal question may be asked ; still, if the answer is unexceptionable, the judgment will not be reversed on that account.

[7.] A memorandum made in pencil, in the pocket-book, taken from the custody of the accused, upon his arrest, may be read in evidence, without proof of its execution.

Larceny, in Baker Superior Court. Tried before Judge WARREN, December Term, 1851.

Waller D. Whaley was placed upon his trial, under an indictment for the larceny of a negro, named Bracewell. A. J. Swinney, a Juror, being placed upon triors, at the request of the prisoner, after the triors and Juror had retired to the Jury room, defendant's counsel moved the Court to send the following written instructions to the triors: "You are requested to ask Mr. Swinney if he did not, a few days ago, in Albany, say, if he (Swinney) could get upon the Jury, when Whaley was tried, he would send the d——d negro thief to the penitentiary?" The Court refused the motion, and defendant excepted.

During the examination of Joel J. Gillon, a witness for the State, the following testimony was drawn out: "Witness instructed the negroes to go, and if they met with the person who wanted to take them away, for Bracewell to go to the house, get his clothes, and come back and let witness know which way they were going ; and the report of the negro, when he came back, induced witness to change his position from the fork of the road to a position on the Starksville road." Defendant's counsel objected to this evidence. The Court overruled the objection, and defendant excepted.

The same witness testified, that "the morning after the arrest, defendant stated to witness that he had a family, and a stigma would rest upon them, if he was prosecuted ; and that he had but forty dollars, and this was in gold, and that he would give it to witness if he would let him off, or let his gun miss him."

To the admission of this testimony defendant objected. The Court overruled the objection, and defendant excepted.

The same witness testified, that "the negro had a budget

with him, when prisoner was arrested." Defendant objected, on the ground that witness had ordered the negro to get his clothes. The Court overruled the objection, and defendant excepted.

William J. Wright, a witness for the State, testified to certain confessions made to him by the prisoner. On cross-examination, he stated that the confessions were made after witness had threatened the prisoner. On being interrogated by the Court (defendant's counsel objecting) as to the character of the threat, he stated, that "after the arrest, witness asked the defendant if he had ever been in the County before? Defendant said he had, 10 or 11 years ago. Witness then said, from his manner and appearance, he must be the man who had stolen Mr. Peake's negroes, and sold them in Alabama; defendant said he was not; witness said he could tell, as the negroes were on Mr. Peake's plantation, and that he would send for them, and called for a boy to send; the defendant then took witness to one side, said he did not like to be exposed, and then made the confessions testified to."

The defendant's counsel moved to exclude the confessions thus made. The Court overruled the motion, and defendant excepted.

Counsel for the State asked the witness "what defendant said about having committed similar crimes before." Defendant's counsel objected. The Court overruled the objection, and defendant excepted.

George Knight, a witness for the State, testified, "that he never laid the plan to detect defendant, until he supposed there was some one in the neighborhood trying to steal negroes, and his suspicion was founded upon the information of negroes." Defendant's counsel objected to this evidence. The Court overruled the objection, and defendant excepted.

Counsel for the State proposed to read to the Jury the following memorandum, written by pencil, in the pocket-book of defendant: "Wilkins," "Paul Tarver's," (being the names of the owners of the slaves with whom defendant was proved to be in communication.) Defendant's counsel objected, on the

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ground that it was not proved to be the hand-writing of defendant. The Court overruled the objection, and defendant excepted.

On these several exceptions, error has been assigned in this Court.

H. MORGAN, for plaintiff in error.

Sol. Gen. LYON and R. H. CLARK, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first question presented for our consideration is, whether, when a Juror has been put upon triors, at the instance of the prisoner, and they have retired to their room, it is competent for the defendant's counsel to move the Court, to send written instructions to the triors, to propound to the Juror a particular interrogatory, for the purpose of establishing his ineligibility.

We are clear, that such a practice is not only irregular, but fraught with the most mischievous consequences. The proper course would be, to have the triors brought into open Court, and there instructed publicly, in the presence of both parties, respecting the whole matter.

[2.] The next error complained of is, that the Court permitted Gillion, one of the witnesses sworn on the trial, to state, that in consequence of what was said to him by a negro, that he was induced to change his position in watching for the defendant.

We see no error in this. Suppose the witness had been influenced by some noise he heard—the barking of a dog, or the cackling of fowls—to change his position, would it not be competent for him to testify to the fact?

[3.] The third assignment is, that a witness was allowed to prove that the prisoner had offered him forty dollars in gold, to suffer him to escape. It is argued, that this attempt to bribe the guard, in order to effect his escape, is consistent with inno-

cence. But that is not the test. Is it no index of guilt? If flight is a circumstance, however slight, which tends to criminate the accused—then proof that the prisoner offered money, in order to effect his escape, is certainly admissible.

[4.] It was in proof, that the negro had a budget of clothes with him when the prisoner was arrested. Defendant's attorney objected to this testimony, upon the ground that the witness had ordered the negro to bundle up his clothes, and take them along.

It is conceded that it would be a dangerous precedent to encourage one citizen to tempt another to the perpetration of a crime, and then to array the circumstances, which he himself had contrived, in order to convict him. But that is not this case. The initiatory steps had been taken by Whaley, to steal this slave. It was necessary to ascertain whether he intended to carry off the negro, and hence the directions which were given for his equipment for the journey.

[5.] Wm. J. Wright swore to certain confessions made by the prisoner. On his cross-examination, he stated that these were made through fear. Upon being interrogated by the Court, (prisoner's counsel objecting,) as to the nature of the threats, it turned out that the witness was mistaken, that he misapprehended the meaning of the term. We hold that the Court was right in prosecuting the inquiry, which he did, in order to ascertain whether, in fact, any threats were used; and we are equally clear, that the statement when made, did not constitute such a threat as would exclude the confessions.

[6.] Counsel for the State asked a witness what the defendant said about having committed similar crimes before? The question was objected to, but allowed to be propounded. The answer was, that he stated, that it had been his misfortune for a considerable time, but that he had never been interfered with before.

Here, it will be perceived, was an indirect acknowledgment, though rather awkwardly expressed, that the prisoner had committed the present offence. He admits that this was not the first time he has been engaged in inveigling off slaves; but

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adds, that he was never caught before; thereby including the act with which he was then charged, in the same category with past transgressions of a like character. We see no objection to the answer at least, and if that is legal, we would not reverse the judgment, because it was elicited by an improper question.

[7.] The next error assigned, viz: that the witness, George Knight, stated that he was prompted by information derived from negroes, to waylay the prisoner, has already been considered, under the second head in the bill of exceptions.

[8.] Counsel for the State proposed to read to the Jury, the following memorandum, written in pencil, in the pocket-book of the defendant, and taken from his custody, "Wilkins," "Paul Tarver." These were the names of the owners of the slaves with whom the defendant was proven to be in communication. Defendant's counsel objected, on the ground that the entry was not shown to be in the hand-writing of the accused. But the Court overruled the objection, and the defendant, by his counsel, excepted.

If a paper is produced in Court, under notice, from the possession of the opposite party, it dispenses with proof of its execution. A document appended as an exhibit to a bill or answer, need not be proven by the adverse party. We think that the testimony in this case was properly admitted.

No. 21.—WALLER D. WHALEY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] A Sheriff or other arresting officer, in a criminal prosecution, has no authority to seize the defendant's property, and hold the same for the payment of costs, unless directed so to do by the Magistrate issuing the warrant, as provided by the Act of 1816.

Motion, in Baker Superior Court. Decision by Judge WARREN, December Term, 1851.

Waller D. Whaley was arrested by the Deputy Sheriff of Baker County, under a warrant, charging him with the offence of larceny. The officer issuing the warrant gave no directions under his hand and seal, for the seizure of a sufficient amount of property for the payment of all legal costs and expenses, as provided by the Statute. The arresting officer, however, seized a horse, saddle and bridle. No schedule of this property was rendered to the committing Court, but there was a written consent by the defendant, at the return of the warrant, that the property should be sold and the money held in the stead of the property. The property was sold for the sum of one hundred and five dollars.

The defendant moved in the Court below, that this money should be paid over to him. The Court refused the motion, and this decision is brought up by the defendant for review.

H. MORGAN, for plaintiff in error.

Sol. Gen. LYON, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] In this case, the Sheriff of Baker shows no legal authority to retain the proceeds of the defendant's property in his hands. The warrant under which the defendant was arrested, contained *no directions* to the arresting officer to seize the property of the defendant, as provided by the Act of 1816. *Cobb's N. Dig.* 857.

The consent of the defendant that the property should be sold and the proceeds of the sale be held instead of the property, did not divest the defendant's title to the money.

The arresting officer, so far as the record shows, had the possession of the defendant's property, *without the authority of law*, and the defendant's consent that the property should be converted into money, confers no better title to the proceeds of the sale than he had to the property. The money might have been sub-

jected to the payment of the costs after the conviction of the defendant, by entering up judgment therefor, according to the provisions of the Acts of 1820 and 1830, as was ruled by this Court, in *Peters vs. The State of Georgia*, 9 Ga. R. 109. Such judgment, or the execution issued thereon, would doubtless have conferred sufficient authority upon the Sheriff, to have retained the money from the time such judgment or execution was placed in his hands; or so much thereof, as would have been sufficient to pay the costs of the prosecution.

Let the judgment of the Court below be reversed.

SUPREME COURT OF GEORGIA.

MACON TERM, FEBRUARY, 1852.

At a meeting of the Bar of the Supreme Court, Judge LUMPKIN in the chair, the death of RICHARD K. HINES, Esq. being announced—on motion, a committee of three, consisting of Samuel Hall, John J. Floyd and Zachariah E. Harman, Esqs. was appointed, to report to the Bar such proceedings as would express our condolence with the family of Mr. Hines, in their severe affliction, and our regard and esteem for his memory : which committee on this day, reported as follows :

Again has death invaded our professional circle, and wrested from it, one of its brightest ornaments. On the 8th day of January last, Richard Kennon Hines, Esq. aged 46, for many years a prominent and distinguished member of this Bar, yielded his body to the dust of which it was formed, and his spirit to God who gave it. Mr. Hines was a native of Chatham County, North Carolina, whence he removed with his parents, at a very early age, to the State of Georgia. He was educated at Franklin College, where he graduated with the highest honors of a class which has since given to the State some of her most useful and distinguished citizens. He studied his profession in the office of the late lamented Judge *L. Q. C. Lamar*, and commenced his career as a professional man, in Milledgeville, in which place he resided for a number of years, and by his liberality, intelligence and probity, secured and enjoyed the warm regard and esteem of his friends and fellow-citizens. On more occasions than one, without any solicitation upon his part, he was honored with their confidence and support, by being returned to the Legislature of his adopted State. In this body, Mr. Hines made few speeches, but notwithstanding his repugnance to these public exhibitions, he maintained a high and dignified position, and

Tribute of Respect to the Memory of Richard K. Hines.

wielded an influence commensurate with his rare and distinguishing modesty, not for any ephemeral or selfish purpose, but for the advancement of the permanent prosperity and honor of the great State which he had voluntarily made his home, and in whose bosom his remains are deposited. After Mr. Hines' removal from Milledgeville, he settled in this City, and opened an office, since which time, he has resided here, and been constantly engaged in the laborious and arduous duties of a various and extensive practice, in which it would be barely justice to say, he was eminently successful. In his demeanor to the Bench and Bar, Mr. Hines was entirely courteous; to the younger members of his profession, he was remarkably kind; freely giving them, upon all proper occasions, the result of his own rich experience and extensive research; asking no other reward for his pains and trouble, than the pleasure which the consciousness of a good deed bestows. Mr. Hines was not gifted as an orator, but he was deeply versed in the principles of his profession; possessed fine powers of discrimination, and his judgment was so clear and sound, that he was rarely misled upon any subject submitted for his decision. His habits were laborious; he read incessantly, and read understandingly; the hours spent over his books were not those of listless apathy, but active thought. What he read he made his own, and corrected and systematised it by his reflection. The knowledge thus acquired and thus garnered, reminds us of the "light that streams through the stained and storied windows of an ancient cathedral; it is not light merely, but light modified by the rich hues and the quaint forms and the various incidents of the pictured medium through which it passes." Mr. Hines avoided notoriety, and never on any occasion permitted himself to be rendered conspicuous; he was emphatically

"One of that noiseless but noble throng,"

who, while they shrink from the public gaze, fill a station in the profession quite as lucrative, honorable and important, as those who act a more prominent and conspicuous part. In his social relations, he was all that could be desired. Towards his family, upon whom his death has fallen with a sudden and crushing weight,

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he ever cherished the most undying love, and feelings of the greatest tenderness. Thus endowed, he has been cut off in the midst of life; having in the brief space allotted to him on earth, met with heavy reverses, which he bore without repining, or despairing, and passed through great vicissitudes. We cannot reconcile it to our feelings to consign such a man to the tomb, without an expression of our deep regret at his untimely demise; without tendering his family our sincere condolence in their distress, and without offering a lasting testimonial of the respect and esteem we cherish for his memory. Therefore,

Resolved, That we sincerely deplore the loss of our friend and professional brother, Richard Kennon Hines, Esq. and offer to his family, our sincere sympathy and condolence, in their bereavement.

Resolved, That we will, in token of our sorrow, wear the usual badge of mourning for the space of thirty days; and that as a lasting testimonial of the regard and esteem which we cherish for the memory of the departed, the Supreme Court now in session, be requested to cause the foregoing to be entered on the minutes of said Court.

Resolved, That the family of Mr. Hines be furnished by the Clerk of this Court with a copy of these proceedings, and that the same be published in the gazettes of this City.

By the Committee,

SAMUEL HALL,
JOHN J. FLOYD,
Z. E. HARMAN.

The report being read, his Honor Judge LUMPKIN, in behalf of the Court, responded as follows:

The character of him whose death we commemorate, admonishes me to be brief. Were he living, no one would listen more unwillingly to his own praises.

I rejoice to find that my own impressions, as to the character of our deceased brother, are so singularly coincident with those of the committee. I have known few men at the bar, or elsewhere, who, to so much ability, united such real modesty and unaffected diffidence.

Tribute of Respect to the Memory of Richard K. Hines.

Mr. Hines, if I rightly appreciated him, never aspired to the reputation of an advocate. His mind was too practical to cultivate or employ the arts of oratory, or to covet the applause of the listening multitude.

He was one of those rare men who never spoke for fame or effect, but to aid the Court in coming to a right conclusion ; and this fact deservedly gave to his opinions great influence.

He never experimented upon the Bench or the Jury-Box, by assuming positions manifestly untenable, or palpably contradictory. Nothing tends more to emasculate the vigor of the mind, and to dim the bright perceptions of intellectual truth, than to indulge habitually in sophistry. The age for using this once formidable weapon of scholastic gladiatorship, has passed away.

The most striking trait and prominent feature in the character of the deceased, as a man and as a lawyer, was his sound and strong sense. The public knew little of his professional attainments ; but those who have enjoyed the privilege of being associated with him in consultations, retain the most lasting impressions of his consummate ability as a lawyer. His opinions were rarely overruled by his colleagues.

It is a beautiful tribute to his memory, that no attorney ever had clients who clung to him through evil report and good report, with more tenacity. Those who once employed, never left nor forsook him.

Of his private virtues, I forbear to speak. The recollection of them is deeply engraved upon the grief-stricken hearts of his family and friends.

If this kind, indulgent and generous-hearted man, ever made an enemy or lost a friend, the fact is unknown to me ; of one thing I am certain, if he did, the fault was not his.

I knew Mr. Hines in the days of his prosperity, when his voice gave law to the monetary affairs of this section of country. I knew him afterwards, when in common with Biddle and many of the greatest and best men in the country, pecuniary misfortune overtook him ; he was always the same quiet, courteous unobtrusive gentleman.

Tribute of Respect to the Memory of Richard K. Hines.

But his career has closed—his sun has gone down, while it is yet noon. It is a pleasure to have known and loved such men, and to have been loved by them. A few terms since, Mr. Chairman, and standing where you now stand, he offered the passing tribute of our grateful recollection to a departed brother. It may be that he now hears us, and is pleased with this manifestation of our respect and sorrow.

Let the report which has been read, be placed upon our minutes.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
FEBRUARY TERM, 1852.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

**No. 22.—WILLIS A. MANGHAM, plaintiff in error, vs. WILLIAM
H. C. REED, defendant in error.**

- [1.] *Query.* Whether actions for injuries to personal property, are within the provisions of 22 and 23 Charles II. which declares, that in personal actions, when damages are below 40 shillings, the plaintiff shall recover no more costs than damages?
- [2.] In an action of trespass, for an injury done to the plaintiff's slave, the Jury rendered a verdict in favor of the plaintiff for costs: *Held*, that such a verdict and the judgment thereon, are nullities; that in legal effect this was a finding in favor of the defendant; and that the law carried the costs in his favor, against the plaintiff.
- [3.] Upon illegality, the validity of a judgment cannot be inquired into.

Affidavit of illegality to *fi. fa.* for cost, in Pike Superior Court. Decided by Judge STARK, at February adjourned Term, 1852.

An action of trespass was brought by the plaintiff, against the defendant, for the beating of a slave belonging to the plaintiff.

The Jury found a verdict for the plaintiff for the costs of suit, for which a *fi. fa.* was subsequently issued, to which the defendant filed his affidavit of illegality, on the ground "that the action in which the cost accrued, for which the *fi. fa.* issued, was for damages for whipping a slave; and the Jury had no right to find a verdict for costs alone, without finding some damages."

The Court sustained the illegality, and ordered the *fi. fa.* to be set aside, on the ground, "that in this action, the recovery being less than forty shillings, the plaintiff could recover no more costs than damages."

To which decision plaintiff in error excepted.

The plaintiff also moved to dismiss the illegality, upon the ground that it would not lie in such a case as this; which motion the Court overruled and the plaintiff excepted.

W. W. ARNOLD, for the plaintiff, made the following points, and cited the following authorities:

1. At Common Law, no costs were recoverable; but by the Statute of Gloucester and others, costs were given "in all cases where damages may be recoverable." *Schley's Dig.* 93 and notes. 3 *Comyn's Dig. (Costs)* A. 1 p. 223.

2. This was an action of trespass to personal property, and in such cases, the rule of no more costs than damages, does not apply. 2 *Tidd's Pr.* 3d Am. edit. p. 963. 1 *Chitty's Pl.* 187. 1 *Starkie's Rep.* 55. 3 *Comyn Dig. (Costs)* A. 3 n. 2 p. 228 n. n. p. 231, '2, 33, '4.

The rule only applies to *personal actions proper*, (and not to actions for injury to personal property) and by special acts to actions for slander, &c. 3 *Comyn Dig. Cost*, A. 3 p. 228, n. n. p. 231, '4. 2 *Tidd's Pr.* 965. 2 *Wheat. Selw.* 1371, '2, '4.

3. Again: the rule does not bind the Jury, but only the Court; and here the Jury expressly find for the plaintiff "*the costs of suit.*" 3 *Com. Dig. Cost*, A. 3 n. 2 p. 228 and 233. 2 *Tidd's Pr.* 967. And by pleading only the general issue, the

defendant is bound to pay the costs. 5 *Bing. Rep.* 196. 3 *Brod. & B.* 117.

4. In this case, illegality is not the proper remedy. It goes behind the judgment to the verdict. 7 *Ga. Rep.* 204.

H. GREEN, for defendant.

Points taken and authorities cited :

1st. At Common Law, previous to the Statute of Gloucester, no costs were recoverable. That Statute gave to the plaintiff the right to recover costs in all actions in which he was entitled to recover damages. 6 *Edwards*, 1. See *Schley's Dig.* 93.

2d. The Statute of 22d and 23d Charles II. restricts the plaintiff's right to full costs, in all actions, *ex delicto*, where the finding is less than 40 shillings, and he is not permitted to recover any more costs than damages. See *Schley's Digest*, 251. 2 *Sellon's Practice*, 430.

3d. The Jury cannot control the costs in but one way, and that is by finding the amount of damages required to carry costs. *Hardin vs. Lumpkin*, 5 *Ga. Rep.* 452.

4th. The Statute of 22d and 23d Charles II. was held by the Judges, in Convention, to apply to an action of malicious prosecution. There the finding of the Jury was for one dollar; and the Judges held that the plaintiff was entitled to no more costs than damages. *Dudley's R.* 176.

By the Court.—NISBET, J. delivering the opinion.

[1.] No final costs were recoverable at Common Law. 2 *Inst.* 288. *Tidd's Pr.* 945. 2 *Com. Dig.* 542. By Statute of Gloucester, (6 *Edwards*, 1.) the plaintiff shall recover costs in all cases where damages are recovered. Divers Statutes were subsequently passed to restrain this right of parties plaintiffs. The policy of these restraining Statutes was to discourage vexatious suits. The Statute with which we have to do just now, is that of 22 and 23 Charles II. By this Statute it was enacted, that "in all actions of trespass, assault and bat-

tery, and other personal actions, wherein the Judge at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was proved, or that the freehold or title to the land mentioned in the plaintiff's declaration, was chiefly in question; the plaintiff, in case the Jury shall find the damages to be under the value of 40 shillings, shall recover no more cost of suit than the damages so found shall amount to." Whether trespass for injuries to personal property is within the provisions of this Statute, I do very much doubt. I am, indeed, inclined to believe that injuries to personal chattels are not within it. It has certainly been ruled in the British Courts, that when a party goes for a substantive, independent injury, done to personal chattels, this Statute does not apply. 1 *Salk.* 208. 1 *Str.* 534. 7 *Moore*, 269. 5 *D. & E.* 482. 1 *Taun.* 357. *Tidd's Practice*, 965.

[2.] This action is for an injury done to the plaintiff's slave. We are all agreed, however, that this is a case where the plaintiff below was entitled to no costs at all; but that on the contrary, the defendant was entitled to his full costs. We so rule, upon the ground that the finding of the Jury, was, in legal contemplation, a finding for the defendant, and that the cost thereby was cast upon the plaintiff. The Jury rendered a verdict for the costs, in favor of the plaintiff. The question for the Jury to find, was that made by the pleadings. The plaintiff alleged an injury to his slave, by which he lost his services, and claimed damages. The defendant pleaded not guilty. The issue made was this: *is the defendant guilty of the alleged trespass?* Their duty was to determine that question upon the proofs, and upon the proofs assess the damages. If they found him guilty, it was their duty to give damages; if not, to find, generally, for the defendant. Here they have found no damages for the plaintiff, and the conclusion of the law is, that they could not and did not find the defendant guilty of the trespass. They found the costs for the plaintiff, but having found no damages—having thus determined the issue against the plaintiff—they had no right to find costs in his favor. To do so is to violate the law, for a finding for the defendant casts the costs in his favor. It is no part of

their duty—that is, it is not necessary for the Jury, at Law, to say a word about the costs, in any event; for the law determines who shall pay the costs, upon their verdict. If they find damages for the plaintiff, they need not say with costs, for the law has settled that. If they find for the defendant, then also, the law determines the cost. At Law, the Jury cannot, as they may in Equity, find a special verdict. They cannot find the issue made in the pleadings against the plaintiff, and at the same time find the costs for him. They have no power to do, what may seem to them equity between the parties. Their duty is single. Having undertaken to do what they cannot do—give costs without finding any damages—the result is, that their finding of costs is a nullity; and the finding was, in Law, a verdict for the defendant. When there is a verdict for the defendant, by Statutes of Great Britain, of force in Georgia, he is entitled to cost. *Statute 23d Henry VIII. Schley*, 160. *Statute 4th James I. Schley*, 235.

[3.] The verdict in this case, and the judgment for costs in favor of the plaintiff below, was a nullity. But the remedy, by illegality, filed against the execution, does not reach the evil. It is too well settled in our Courts, to need a farther remark, that illegality cannot inquire into the validity of the judgment. The execution followed the judgment. It was regular, and nothing is alleged against it, as having occurred subsequent to the judgment. The counsel for the defendant in error knows the rights of his client, and will, no doubt, know how to pursue them. And whilst we agree with the Court below, that in this case, the plaintiff in the action, is not entitled to any costs, we reverse the judgment, on the ground that the proceeding by illegality, cannot help the defendant.

No. 23.—H. G. R. McNEIL, for the use, &c. plaintiff in error,
vs. E. F. KNOTT, defendant in error.

- [1.] A plea, that before the right of action accrued upon the note which is sued on, to wit, in May, 1843, the defendant became a bankrupt, within the true meaning and import of the Act of Congress of 1841; and that by reason thereof, the debt, which is the foundation of the action, is fully discharged, and its recovery completely barred, is sufficient to admit the certificate of discharge.
- [2.] If the plea of bankruptcy was defective, the case being in the last resort, the defendant should be allowed to amend.
- [3.] A certified copy of the order of discharge, reciting all the previous proceedings which had been had in the case, and that the applicant had fully complied with every requisition which had been made upon him by the Court, and obeyed every provision of the law, is a proper certificate of discharge, as required by the Act.
- [4.] Every indorser of a promissory note, warrants that the note is valid, and that the maker is liable to pay it.
- [5.] Upon a qualified indorsement, to be liable in the second instance only, if the note has been previously paid by the maker, the right of action accrues immediately in favor of the holder, against the indorser.
- [6.] Under the Act of 19th August, 1841, contingent demands, arising out of indorsements, bail and other uncertain undertakings, may be proven against the bankrupt, and when these claims become absolute, they will be allowed to participate in the bankrupt's effects.

Assumpsit, in Pike Superior Court. Tried before Judge STARK, February adjourned Term, 1852.

On the 31st day of May, 1839, William Segur and William Crawford executed their joint and several promissory note, to Henry Kunkle or bearer, for one hundred dollars, payable on the 25th December, ensuing. Kunkle transferred the note to Edward F. Knott, by delivery. On the 14th day of December, 1841, Knott transferred the note to the plaintiff, by the following indorsement:

"I indorse the within note, to be liable in the second instance."
E. F. KNOTT.

On this indorsement this action was brought. Among other pleas, the defendant filed the following, "that plaintiff ought not to be permitted to maintain his said action against the defendant; because, after the making of said several supposed promises and undertakings in the said declaration mentioned, if any such were made, and after the accruing of the said several supposed causes of action, if any such ever accrued, to wit, on the 23d day of May, in the year 1843, he, the said defendant, became a bankrupt, within the true meaning and intent of the Statute then in force, concerning bankrupts, to wit, an Act or Statute, passed by the Congress of the United States in the year 1841; and that said supposed causes of action, in said declaration mentioned, if any such there were or be, did accrue to said plaintiff before this defendant became, and was declared a bankrupt, by which this defendant was discharged from all his debts, including the one sued for, &c. &c. And for further plea, this defendant says, that after the supposed causes of action commenced, and before the commencement of plaintiff's action, this defendant was duly discharged as a bankrupt, under the bankrupt law of the United States, passed in the year 1841," &c.

On the trial on the appeal, at February adjourned Term, 1851, of Pike Superior Court, the plaintiff gave in evidence, an exemplification from the Superior Court of Henry County, from which it appeared, that McNeil, on the 20th day of September, 1842, commenced an action on said note, against William T. Crawford, as the executor of William Crawford, to which the defendant filed the plea of payment, alleging that the note had been paid off by William Segur, when in the hands of the original payee.

At the April Term of said Court, in the year 1845, the Jury found a verdict for the defendant.

The plaintiff having closed, the defendant tendered in evidence his certificate of discharge in bankruptcy, of which the following is a copy:

McNeil vs. Knott.

“ DISTRICT COURT OF THE UNITED STATES, }
DISTRICT OF GEORGIA. }

“ In Bankruptcy : Edward F. Knott, of the Town of McDonough, Henry County, Georgia—Physician, and one of the firm of Crew, Segur & Knott, and of Bond & Knott, and of James & E. F. Knott, of McDonough—a bankrupt, having filed his petition, praying that a full discharge of all his debts may be decreed and allowed, and a certificate thereof be granted him, pursuant to the Act of Congress, entitled an Act to establish a uniform system of bankruptcy throughout the United States, passed the 19th August, 1841 ; and it appearing to the Court, upon the petition and reports of the Clerk and assignee accompanying the same, that the said bankrupt has surrendered all his property and rights of property, with the exception of the necessary household and kitchen furniture, and such other articles as has been designated and set apart by the assignee, and the wearing apparel of the said bankrupt, and that of his wife and children ; and that the said bankrupt has fully complied with and obeyed all orders and directions, which, from time to time have been given and passed by the Court, and has otherwise conformed to all the requirements of the said Act ; and that no written dissent to such discharge has been filed by a majority, in number and value, of his creditors, who have proved their debts, and no cause being now shown to the Court, why the prayer of the petitioner should not be granted.

“ On motion of H. R. Jackson, by Joseph W. Jackson, attorney for the petitioner, it is therefore, by virtue of the Act aforesaid, ordered, decreed and allowed, that the said Edward F. Knott be, and he is hereby, fully discharged of, and from all his debts, owing by him, at the time of the presentation of his petition to be declared a bankrupt ; and it is further ordered and granted, that the Clerk duly certify a copy of this decree, under the seal of the Court, and deliver the same to the bankrupt when demanded.”

Which said certificate was duly certified by the Clerk of said District Court.

To the introduction of the certificate in evidence, counsel for

plaintiff objected, on the grounds: 1st. Because the defendant had not pleaded it.

2d. Because it was not competent evidence, either as a defence or as being such a certificate, as under the Bankrupt Act, could be pleaded in bar.

The Court overruled the objection, and counsel for plaintiff excepted.

On motion of counsel for defendant, the Court permitted the plea to be amended, by pleading the certificate specially.

To which, counsel for plaintiff excepted.

Among other things, the Court charged the Jury, "that if they were satisfied that at the time of making the indorsement, the note had been paid off by one of the makers, to the payee, then the indorsee had an immediate right of action against the indorser, and it was such a subsisting debt, as even in England, might have been proved under the commission of bankruptcy, and such a debt is barred by the certificate; that under our law, even if the defendant's liability, under this indorsement, were an uncertain contingent demand, dependent on the solvency of the makers of the note, the holder of the note might have been permitted to prove his debt, under the Act; and his failure to do so, is a waiver of all future right of recovery, if the debt, though contingent, existed at the time of application."

To which charge, counsel for plaintiff excepted, and upon these several exceptions, have assigned error.

W. W. ARNOLD, for plaintiff in error.

ALFORD & MOORE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

It seems, that in May, 1839, Wm. Segur and Wm. Crawford, made a note for \$100, payable Christmas next thereafter, to one Henry Kunkle or bearer. Kunkle, the payee, transferred the note, by delivery, to Edward F. Knott, who, in 1841, indorsed it to Hector G. H. McNeil, the plaintiff, *to be liable in the*

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second instance. Segur, one of the makers, left the country. Suit was brought against the estate of Crawford, who had died in the meantime, and on the final trial, in 1845, it was proven, and so found by the Jury, that the note had been paid off and discharged by Segur to Kunkle, the payee, while the paper was in his possession. McNeil then sued Knott, who, pending the previous action, to wit, in 1843, had been discharged under the Act of bankruptcy, then in force in the United States; and this writ of error is prosecuted to review and to reverse the several decisions of the Superior Court, upon this trial.

The plaintiff having tendered the note and the indorsement thereon, in evidence, and an exemplification from the Superior Court of Henry County, with some additional proof, showing due diligence on his part, to collect the note out of the makers, and his failure to do so, closed his case.

The defendant then offered a paper, purporting to be his certificate of discharge, as a bankrupt. It was in these words:

“DISTRICT COURT OF THE UNITED STATES, }
DISTRICT OF GEORGIA. }

In Bankruptcy: Edward F. Knott, of the Town of McDonough, Henry County, Georgia—physician, and one of the late firm of Crew, Segur & Knott, and of Bond & Peck, and of James & E. Knott, of McDonough—a bankrupt, having filed his petition, praying that a full discharge of all his debts may be decreed and allowed, and a certificate thereof be granted him, pursuant to the Act of Congress, entitled an Act to establish a uniform system of bankruptcy throughout the United States, passed 19th August, 1841; and it appearing to the Court, upon the petition and report of the Clerk and assignee accompanying the same, that the said bankrupt has surrendered all his property, and rights of property, with the exception of the necessary household and kitchen furniture, and such other articles as have been designated and set apart by the assignee, and the wearing apparel of the said bankrupt, and that of his wife and children; and that the said bankrupt has fully complied with, and obeyed all orders and directions, which, from

time to time have been given and passed by the Court, and has otherwise conformed to all the requirements of the said Act; and that no written dissent to such discharge has been filed by a majority, in number and value, of his creditors, who have proved their debts; and no cause being now shown to the Court why the prayer of the petitioner should not be granted—on motion of H. R. Jackson, by Jos. W. Jackson, attorney for the petitioner, it is therefore, by virtue of the Act aforesaid, ordered, decreed and allowed, that the said Edward F. Knott be, and he is hereby, fully discharged of, and from all his debts, owing by him at the time of the presentation of his petition to be declared a bankrupt; and it is further ordered and granted that the Clerk duly certify a copy of this decree, under the seal of the Court, and deliver the same to the bankrupt when demanded."

I, George Glenn, Clerk of said Court, do certify, that the above orders were made and passed by the Court, on the 23d day of May, 1843. In witness whereof, I have hereunto set my hand, and affixed the seal of the said Court, this 23d day of May, A. D. 1843.

[Seal.]

GEORGE GLENN, Clerk.

The introduction of this account was objected to, on the grounds: *First*, That the defendant had not pleaded it.

Secondly, Because it was not issued in conformity with the Bankrupt Act.

[1.] The answer of the defendant to the action, was in these words: "The said defendant, by his attorney, Andrew K. Moore, says, that after the making of said note, and his indorsement thereon, to wit, on the 23d day of May, 1843, he, the said Edward F. Knott, became a bankrupt, within the true meaning and intent of the Statute passed by the Congress of the United States, in the year 1841; and that said supposed causes of action accrued before this defendant's discharge," &c.

By the Judiciary Act of 1799, the defendant is required to make his answer in writing, which shall plainly, fully and distinctly set forth the cause of his defence. This plea is certainly a substantial compliance with the Statute; and the Court, there-

fore was right in letting in the evidence which was offered under it.

[2.] But had the plea been defective—the case being in the last resort—the party was entitled to amend.

[3.] Whether the certificate be in conformity with the law which authorizes it to be granted, can be best ascertained by reference to the Act itself.

By the 4th section, it is enacted, “that every bankrupt who shall *bona fide* surrender all his property and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with, and obey all the orders and directions which may, from time to time, be passed by the proper Court, and shall otherwise conform to all the requisitions of this Act, shall (unless a majority, in number and value, of his creditors, who have proved their debts, shall file their written dissent thereto) be entitled to a full discharge from all his debts; to be decreed and allowed by the Court which has declared him a bankrupt; and a *certificate thereof granted to him by such Court, accordingly*, upon his petition filed for such purpose.” 5th volume *United States Statutes at Large*, 443.

This form of certificate is that, no doubt, which has been prescribed by the District Court; and none more appropriate, it occurs to us, could be devised. It recites all the previous proceedings which have been had, the compliance by the applicant with every requisition which has been made upon him, and then declares him entitled to a full discharge from all existing liabilities, and directs the Clerk to certify accordingly.

The error which counsel have fallen into, is in confounding the judgment of *discharge*, which is certified by the Clerk, with the *previous decree*, pronouncing the debtor a bankrupt within the true intent and meaning of the Act.

It is next objected, that the Court erred in charging the Jury, that if the note was paid off by one of the makers, to the original holder, at the time that Knott indorsed it to McNeil, that then a right of action accrued at once to McNeil, notwithstanding Knott was to be liable only in the *second* instance; and that consequently he was bound to prove the debt under the commission

of bankruptcy, or lose it; and that if it were otherwise, and the liability of Knott was *contingent* only, depending upon the result of the original suit instituted against the makers of the note, that still, under the Bankrupt Act of August, 1841, the debt *might* have been, and therefore *must* have been, proven or lost.

The correctness of the first branch of the instructions given to the Jury, will depend upon the construction to be put upon the defendant, Knott's indorsement. It is what is termed a qualified or restricted indorsement. He undertakes to be liable in the *second* instance. Mr. Arnold insists, that McNeil was bound to sue the makers, whether the note was discharged or not; and at any rate, that inasmuch as the fact of payment had not been practically ascertained in May, 1843, when Knott was declared a bankrupt, that this indorsement did not constitute such a debt as could have been proven at that time.

[4.] We think otherwise, and hold that even under this limited indorsement, Knott warranted three things: 1st. That the note which he transferred was valid; 2dly, That the maker was liable to pay it; and 3dly, Its ultimate solvency: that is, payment by himself, upon failure to collect the money out of the makers.

[5.] And if the note was paid by one of the makers, to the original holder, at the time it was indorsed, there can be no doubt, we apprehend, that a right of action accrued immediately in favor of McNeil, upon this indorsement. He was bound to test the *solvency*, but not the *genuineness* of the paper. Knott had no title to the note at the time he passed it. His implied guaranty that the makers would pay it, became, therefore, *eo instanti*, infracted; and his conditional undertaking, converted at once into an absolute liability.

[6.] But suppose it were otherwise, and that this portion of the charge was wrong; and that a right of action against the indorser did not accrue to the holder, immediately at the time of the making of the indorsement, on account of the notes having been previously paid off by one of the makers; and this was not, in May, 1843, such a subsisting debt as might, in England,

have been proved under the commission of bankruptcy, but was an uncertain demand, dependent on the result of the suit which was pending at the time that Knott was discharged; still, is it not true, that under the Bankrupt Act of 1841, McNeil would have been permitted to prove, even this *contingent* claim, and thus have entitled himself to the right to participate in the bankrupt's effects, and failing to do so, his remedy against Knott is forever barred?

Even in England now, by the Statute of 6 *Geo. IV. ch. 16*, which was a consolidation and improvement of all the previous Statutes of Bankruptcy, *contingent* debts may be proven; and by the 4th section of the last American Act, it is provided, that "all creditors whose debts are not due and payable until a future day—all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, *indorsers*, bail, or other persons having uncertain or *contingent* demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this Act; and shall have a right, when their debts or claims *become absolute*, to have the same allowed them, &c." *U. States Statutes at Large*, 445.

Here, then, *indorsers* are included, *eo nomine*, in the list of creditors who *may* prove their contingent demands, and who, therefore, are bound to do it at their peril. Shall it be said that the Statute does not mean *indorsers*, who, like Knott, are liable in the second instance only? We find no distinction in the Act, between *indorsers* generally, and those who have partially restricted their liability; and the law making none, we can make none. Indeed there is no good reason why any such should exist. If these *indorsers* are bound on contracts upon which they may be made ultimately responsible, then they should be provided for. Their liability is not more uncertain than that of bail, nor is it more difficult to ascertain the present value of their contingent debts.

We agree, then, with the Circuit Judge, that this was a *subsisting debt* against Knott, at the date of his discharge; because, the note was satisfied and a nullity, at the time he indorsed it; and the holder, in fact, had no other contract to go on, but that

of the indorsement; and further, that before it was ascertained whether this note was collectable or not, out of the makers, it could have been proven as a *contingent demand* against the *indorser*, under the commission in bankruptcy; and that in either view of it—being proveable under the Act—the certificate is a full discharge of the debt, and a complete bar to the suit brought against Knott, the bankrupt, for its recovery, unless the same shall be impeached for some fraud or wilful concealment by him of his property, contrary to the provisions of the Act, which is not pretended on the part of the creditors.

I have not attempted to meet, in detail, every argument that has been urged upon the Court. I rarely do. It would be wholly impracticable. If we entertained doubts, it would be our duty, perhaps, to grant a re-hearing. But deciding according to the best lights before us, we deem the judgment of the Court below to be correct in every particular.

Judgment affirmed.

No. 24.—G. S. and J. M. PETTS, plaintiffs in error, vs. HANNAH ISON, executrix, &c. defendant.

[1.] Where an action of trespass was brought for a *direct* and *forcible injury* to the property of the plaintiff, against the defendant, who died pending the suit: *Held*, that the action *abated* by his death, and could not be *revived* against his personal representative.

Scire facias, in Pike Superior Court. Heard and decided by Judge STARK, February Term, 1852.

The plaintiff in error instituted an action of trespass, against John Ison, the defendant's testator, returnable to the June Term, 1848, of Pike Inferior Court. The alleged cause of action was the injury done to the wagon of plaintiffs, by the de-

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fendant, in cutting all the spokes out of one of the wheels of said wagon. At the December Term of said Court, the Jury found a verdict in favor of the plaintiffs, for \$150. The defendant appealed; pending which, he died.

At the February Term, 1850, of Pike Superior Court, the death of the defendant was suggested upon the minutes of said Court.

On the 13th day of December, 1850, a *scire facias* was issued, requiring Hannah Ison, as the executrix of the said John Ison, to appear at the February Term, 1851, of said Court, and show cause why she should not be made party defendant in said cause, and the same proceed against her, at the said term of said Court.

Judge STARK, on motion, dismissed the *scire facias*, and ordered the action to abate.

To which decision of the Court, plaintiffs excepted.

W. W. ARNOLD, for plaintiffs in error.

H. GREEN, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made by the record, for our judgment in this case is, whether the cause of action *survived* against the executrix of the testator, or whether it *abated* by his death. The plaintiffs, in the Court below, brought an action of *trespass* against John Ison, the testator, and while the action was pending, on the appeal, the defendant died. The declaration alleges, that the defendant, with force and arms, assaulted the plaintiffs' wagon-driver, stopped their team with great force and violence, and with axes, sticks, &c. knocked, hewed and cut all the spokes out of one of the wheels of the plaintiffs' wagon, to their great damage, &c. By the 12th section of the Judiciary Act of 1799, it is declared: "No suit in any of the said Courts shall abate by the death of either party, where such cause of action would, in any case, survive to the executor or administrator, whether

such cause of action would survive in the same, or in any *other form*, but the same shall proceed as if such testator or intestate, had not died," &c. *Prince*, 422. The Legislature evidently had in view the Common Law, at the time of the enactment of this Statute. The mere *form* of the action, however, was not intended to be the criterion for its survivorship or abatement. The rule of the Common Law, as stated by *Blackstone*, is that in all personal actions, arising *ex delicto*, for wrongs actually done or committed by the defendant—as trespass, battery and slander—that *actio personalis moritur cum persona*, and cannot be revived, either by or against their representatives. 3d *Bl. Com.* 302. Mr. Chitty states the rule to be, at Common Law, that in cases of injuries to personal property, if either party died, in general no action could be supported, either by or against the personal representatives of the parties, where the action *must* have been in form, *ex delicto*, and the plea not guilty; but if any *contract* could be *implied*—as if the wrong-doer converted the property into money, or if the goods remain in specie, in the hands of the executor of the wrong-doer—assumpsit for money had and received, may be supported by or against the executor, in the former case, and trover in the latter. 1 *Chitty's Pleading, Dunlap's edition, marginal page* 57. According to Mr. Chitty, the Statute of 4th *Edward III.* has not altered the Common Law rule in its relation to personal property, only in favor of the personal representatives of the *party injured*. 1 *Chitty's Pleading, marginal page* 56. This is an action of trespass against the defendant, for a *direct* and *immediate injury* to the property of the plaintiffs. The defendant nor his estate was not benefited by this *tortious* act; and in such cases, the rule of the Common Law, *actio personalis moritur cum persona*, applies. *Cravath vs. Plympton*, adm'r, 13 *Mass. Rep.* 454. 1 *Saunders' Rep.* 216, note 1. *Franklin vs. Low & Swartwout*, 1 *Johns. Rep.* 401. This action of *trespass* would not survive at Common Law, and we are unable to perceive that it would survive in any *other form of action*. The law, very clearly, would not raise an assumpsit upon an *implied* contract, in favor of the plaintiffs; and the injury having been *direct*, and committed with *force*, an action on

the case could not be maintained, nor would trover lie. The result, therefore, is that the plaintiff's cause of action against the defendant, *abated* on the death of the latter, and cannot be revived against his legal representatives.

Let the judgment of the Court below be affirmed.

No. 25.—JAMES GARRISON, plaintiff in error, *vs.* LEVI WILCOXSON, defendant in error.

[1.] The plaintiff in error made and delivered to the defendant, the following paper: "Received of Levi Wilcoxson, ninety dollars in cash, and one note on Echols Daniel, of one hundred and sixteen dollars, which I agree to settle, when we have a final settlement. This, 8th April, 1843, with interest from date." (Signed.) JAMES GARRISON." *Held*, that after the lapse of a reasonable time, and demand of a settlement, and refusal, an action lay in favor of the plaintiff in error against Garrison, the defendant, upon this instrument, for damages.

[2.] In determining whether an appeal is frivolous, it is the duty of the Jury to consider all the evidence in the cause.

[3.] The relative duties of the Jury and the counsel in a cause, stated.

Case, in Coweta Superior Court. Tried before Judge HILL, September Term, 1851.

This was an action on the case, brought by the defendant in error, against the plaintiff in error, on a receipt, of which the following is a copy:

"Received of Levi Wilcoxson, ninety dollars in cash, and one note on Echols Daniel, of one hundred and sixteen dollars, which I agree to settle when we have a final settlement, this 8th April, 1843, with interest from date."

"JAMES GARRISON."

On the trial, plaintiff proved that he had frequently requested the defendant to come to a settlement. It was also in proof, that on one occasion, the parties entered upon a settlement, but that the same was broken up before completed.

The defendant introduced no testimony.

The Court charged the Jury, "that the receipt imposed upon the parties mutual or concurrent obligations; upon the plaintiff, to allow it to be accounted for on final settlement, when it should be made, and if it never took place, then the defendant was liable in this form of action, for damages or money had and received to plaintiff's use, upon the receipt; and he being under at least equal obligation with the plaintiff, to make the settlement, was bound to plead and prove that he was entitled to have a settlement with plaintiff, and account in that way, instead of being responsible in money; and further, that he was, on his part, ready and willing to make the settlement; that the plaintiff was only bound to negative the language of the contract in the statement of the breach, and not even to prove that negative, while defendant was bound to show performance affirmatively—there being no objection to the declaration, but counsel admitting it to be sufficient."

The Court farther charged the Jury, that the plaintiff might sue and recover, on the receipt alone, in this form of action; provided the defendant had notice of his wish and request to settle, and the matters remaining unsettled between them might still be settled and adjusted between them voluntarily, or by another suit, &c.

The Court also charged the Jury, that if they believed the appeal was frivolous, they should find such damages as they might think proper; and that in determining whether the appeal was frivolous, they must look to the evidence introduced by defendant, and not to the argument of counsel, in the progress of the case.

To which charge of the Court, plaintiff in error excepted.

W. DOUGHERTY & SIMMS, for plaintiff in error.

McKINLEY, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] We cannot doubt but that the presiding Judge took the correct view of this paper. It is an undertaking, on the part of the defendant, that he would settle with the plaintiff, the sum of ninety dollars in cash, and the amount of a promissory note upon a third person, (which amount of cash, and which note, he, in the instrument, acknowledges to have received from him,) when he and the plaintiff should have a final settlement. There is no time specified for the settlement. The obligation to come to a settlement is mutual, and it is the right of the plaintiff, when the settlement is had, to have this money and the proceeds of this note accounted for—it is of course the obligation of the defendant to account, when the settlement is had. It cannot be, however, that the settlement referred to, can be postponed or evaded for an indefinite period of time. No time being fixed by the parties for the settlement, no time is fixed for the maturity of this paper. In such a case, the law fixes a time, and that is within a reasonable time. After the lapse of a reasonable time, the plaintiff had the right to demand a settlement, and if declined or refused, a right of action then accrued to him for damages growing out of such refusal; and the money and note, with interest, would be the criterion of damages, in the absence of any defence, which, in law, ought to prevail. A reasonable time had elapsed in this case. The instrument bears date in April, 1843, and the suit was instituted in 1849. A demand for a settlement was averred in the declaration, and proven on the trial. If the defendant has settled and accounted, or if he has been prevented from coming to a settlement and accounting, by the act of the plaintiff, he can show these things on the trial. So also, he may, in his defence, go into the settlement, and show that upon settlement, he owes the plaintiff nothing; and if the Law is insufficient to give him a complete defence, upon a proper case made, the doors of the Court of Chancery are open to him. No question is made about the

form of action, or the sufficiency of the pleadings. Upon this assignment we are with the Court below.

[2.] We cannot sustain the Court in its instructions to the Jury, relative to their duty in assessing damages for a frivolous appeal. The Jury are instructed, that in determining whether the appeal is frivolous, they are not to look to the argument of counsel, but to the evidence for the appellant. The Statute directs that upon hearing the appeal, if it shall appear to the Jury that the appeal was frivolous and intended for delay only, they shall assess damages to the party aggrieved by such delay, not exceeding ²⁵ per centum, on the principal sum they shall find due. *Prince*, 426. The object of this Act is to prevent groundless appeals, by inflicting a penalty, in the shape of damages, and to compensate the respondent for the delay, cost and vexation occasioned by such appeals. The appeal is matter of right, and liability to damages is incurred to prevent an abuse of the right. The Jury are made the judges of the question, whether the appeal is frivolous; and in deciding it, they are required by the Act to determine also whether it be intended for delay only. They are to determine that it was frivolous: that is, unmeaning, trifling, without reason; and are also to determine that it was intended for delay only, before they can give damages. An appeal is frivolous, when there is manifestly nothing in the evidence to sustain the cause of the appellant; and when this is the case, the inference is legitimate, that it was intended for delay only. Receiving, as it is their duty to do in all cases, the law of the case from the Court, they are to consider of the evidence; from that they derive their verdict, and from that also, they are to judge whether the appeal is frivolous. If, from a view of the evidence, they find nothing to sustain the cause of the appellant—nothing to support his defence—nothing which denies to the plaintiff a right to recover, they are bound to adjudge it frivolous, and to assess the damages accordingly. But in arriving at this judgment, they are clearly not at liberty to consider only the evidence which the appellant has brought forward. They must look to all the evidence in the case. The appellant may have no evidence, except what he had on the

trial at Common Law, and yet his appeal may not be frivolous. The weight of the evidence may be decidedly against him, and yet the appeal may not be frivolous. His right to appeal and a hearing before a special Jury, is, under our system, a great and valuable right, and ought not to be discouraged but upon clear grounds. He may introduce no evidence whatever, and his appeal still may not be frivolous. A defence is not unfrequently sustained by the plaintiff's evidence. The plaintiff may not have proved his case so fully as to warrant a recovery; or the evidence may be so ambiguous as to admit of doubt as to his right. When in such cases, an appeal is taken by the defendant, it would be manifestly contrary to the Statute which gives the right of appeal, to visit the appellant with damages. Enough has been said to show, what it was my purpose to illustrate, that in determining the question of frivolity, the Jury must not look alone, as the Court instructed them, to the evidence for the appellant, but to all the evidence in the case. Upon this ground we award a new trial, unless the respondent shall remit the damages assessed by the Jury.

[3.] The Court further, as we have seen, charged the Jury, that in determining this question, they were not "to look to the argument of counsel." Upon this subject, we can lay down no rule with precision. In a very significant sense, they must *look* to the argument of counsel. Parties have a right to appear by counsel, and it is the privilege of counsel to address the Jury on the facts. If the Jury are to disregard the argument of counsel altogether—if they are to shut their ears to their illustrations, comments and reasonings, how unmeaning, indeed how absurd is the appearance of counsel! It is a most valuable right to be represented by learned and eloquent counsel, not only before the Court, as to the law, but also before the Jury, as to the facts.

It means something—it is a guarantee against the encroachments of power upon the personal rights of the citizen. It is, in this country, no mean privilege. So far as the facts of a case are concerned, the privilege is valuable, just because the Jury may look to the argument of counsel—may consider his reasoning, before making up their verdict. I do not suppose that

the Judge, in this instance, intended to instruct the Jury, that they should not listen to, and avail themselves of the aid of the argument of counsel, in coming to a decision in this case. He meant that the argument of counsel should not be to them a *basis* of decision. He meant to say that the statements and inferences of counsel are not the criterion of their judgment, but that the evidence is. In this view of the charge, it is not at all objectionable. The true view of the position of counsel, before the Jury, is that of aids or helps. They are officers of the Court—amenable to its authority, subject to its correction, and restrained by usages of honor and courtesy, which, however, in some instances disregarded, are as ancient in their origin and as potent for good, and as generally respected, as any usages which belong to any class of the highest grade of civilized man. The duties of the advocate are among the most elevated functions of humanity. Whilst he is the representative of his client's cause, yet these considerations insure an honorable advocacy. His business is to comment on the evidence—to sift, compare and collate the facts—to draw his illustrations from the whole circle of the sciences—to reason with the accuracy and power of the trained logician, and enforce his cause with all the inspirations of genius, and adorn it with all the attributes of eloquence. It is the business of the Jury to listen, to be informed, but not to obey. They sit, the sworn arbiters of the cause, bound by the most solemn sanctions, to do justice between the parties, *according to the evidence.*

No. 26.—THOMAS B. WYCHE and Wife, plaintiffs in error, vs.
THOMAS B. GREENE, defendant.

[1.] At Law, an agreement must be strictly performed; but Courts of Equity will, in cases of accident, surprise, fraud or ignorance, under certain circumstances, grant relief.

- [2.] If a writing has been executed, with a view of obtaining a particular object, and by mistake, it has been so drawn as not to have the contemplated operation at Law, Chancery will reform the instrument, so that it will fulfil the intention of the parties.

Agreements, whether executed or executory, within or without the Statute of Frauds, whether for the conveyance of real or personal property, will be reformed by Courts of Equity, on the ground of mistake.

- [3.] The proper inquiry, in all applications for relief against mistakes is, does the instrument contain the true agreement between the parties? Is it what they intended it should be?

- [4.] As to the degree of proof that will be required, before relief will be granted against written instruments, no uniformly inflexible rule has been prescribed. The *mistake* itself should be *plain* and made out by evidence clear of all reasonable doubt.

- [5.] Relief will be granted in *certain cases*, not only where the fact of the mistake is expressly established, but where it is fairly inferred from the nature of the transaction.

- [6.] Courts of Equity will grant relief more readily, where the mistake is made to appear, by reference to another writing.

- [7.] The instrument reformed, takes effect from the time when it was originally executed.

- [8.] It is not necessary that the *donee* should be cognizant of the instructions given to the scrivener by the *donor*. It is sufficient to entitle those claiming under the deed of gift, to have it reformed if he accepted it, as it was understood and intended to be drawn at the time it was executed.

- [9.] Equity will interfere to correct mistakes and reform written contracts between the original parties, and those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, and judgment creditors or purchasers from them, with notice of the facts.

- [10.] Title to relief against mistakes may be forfeited by acquiescence or unreasonable delay; but lapse of time can never be set up as a defence in Equity, when it would not constitute a good statutable bar at Law.

- [11.] The Courts, slow at all times in exerting their authority, to reform written instruments, will be much more reluctant to interpose where upwards of thirty years have elapsed since the execution of the instrument. In such a case, the mistake should be made out by the most explicit and unequivocal proof.

- [12.] When, from the record, it appears conclusively, that the proper decision was made, the proceeding will not be reversed on error, because bad reasons are given for it, unless the party was prejudiced thereby.

- [13.] If there is Equity in a bill, the want of all the necessary parties is not a sufficient ground for refusing to sanction it.

[14.] To transfer property by gift, there must be a deed or instrument of gift—or, an actual delivery of the thing, to the donee.

In Equity, in Upson Superior Court. Application for injunction; refused by Judge STARKE, February Term, 1852.

The bill charges, that the complainants intermarried in the year 1839; and that Adaline W. Wyche is the daughter of Patience C. Greene, who was the daughter of Batt Wyche; that Patience C. Greene intermarried with Thomas B. Greene, the defendant, in the year 1814, and they have had the said Adaline W. and seven other children, the issue of said marriage; and that Patience C. Greene died in 1848.

The bill charges that Batt Wyche, in February, 1817, entertained a *design* to loan his daughter, Patience C. during her life, four negro slaves, viz: Sally, Moses, Ellick and Sealy, together with their increase; and at the death of said Patience C. to give said negroes in fee simple, to the children of said Patience C. share and share alike; and that for the purpose of executing this design, he made and delivered a deed of gift, of which the following is a copy:

“STATE OF GEORGIA, MONTGOMERY COUNTY.

“Know all men by these presents, that I, Batt Wyche, for and in consideration of the love and affection which I have and bear unto my well beloved daughter, Patience Clark Greene, and the issues of her body, do give, grant and relinquish unto the said Patience C. Greene and issue, four negro slaves, to wit: Sally, now runaway, Moses, Ellick and Sealy, together with all their increase, heretofore and after these presents, the rights thereof, whatsoever unto the said slaves and increase, to have and to hold the said slaves and increase as aforesaid, unto the before named Patience C. Green and issues, forever freed and cleared of, and from the claim of him, the said subscriber. In witness whereof, the said Batt Wyche has hereunto set his hand and seal, the 15th day of February, 1817.

W. CONNER,

BATT WYCHE. [L. s.]

J, G. CONNER, J. I. C.

Wyche and Wife vs. Greene.

On the deed were the following entries : " I make an addition to the within deed, of five hundred dollars, in place of a small negro and other things. Given under my hand, this 6th day of October, 1817, to be paid next fall.

" BATT WYCHE."

" Received, the 12th day of April, 1819, four hundred and fifty dollars of the above deed.

" THOMAS B. GREENE."

" Received, June 2d, 1821, in full, for the above, fifty dollars.

" THOMAS B. GREENE."

The deed was duly recorded in the Clerk's office of the Superior Court of Montgomery County, on the 27th day of May, 1817.

The bill charges, that the draftsman who drew the deed of gift, made a mistake in drawing the same, and that he ought to have drawn it so as to have loaned said negroes and their increase, to said Patience C. during her life, and to have given them to the children of said Patience C. at her death; and that said Batt Wyche so intended said deed, at the time he made the same; and that the defendant, Thomas B. Greene, so understood the same, when he received said deed.

The bill charges, that Batt Wyche, in his life time, delivered the deed of gift to Thomas B. Greene, and the negroes to him and his wife; that Greene kept the deed of gift till after the death of Batt Wyche, that is, until 1824, and then delivered it to George Wyche, administrator of Batt Wyche, as a voucher for money paid him by said administrator; and that it was found in 1850 or 1851, among the papers of the said George Wyche.

The bill charges, that Greene, at the time he received said deed of gift, and while he held the same, had knowledge of the *design* of Batt Wyche, only to loan said negroes to said Patience C. and to give them to her children; that the said negroes, Sally and Sealy, had issue, twenty-nine negroes, all of which Greene had in his possession, in March, 1850. The bil

states, that at the April Term, 1850, of the Superior Court of Upson County, complainants brought their action of trover against the defendant, for said negroes; and that at the October Term, 1850, of said Superior Court, the action of trover came on for trial, and the Court refused to allow complainants to show said mistake, and a verdict was rendered in favor of the defendants, from which complainants had taken an appeal, which was now pending.

The bill prayed that the mistake might be corrected, the deed of gift reformed, and the action of trover enjoined.

Judge STARK refused to sanction the bill, upon the following grounds:

1st. Because the complainants are plaintiffs in the action of trover, and this bill is filed to aid the recovery at Law. If the object of the bill shall be attained and the deed of gift reformed; still the plaintiffs having no legal interest in the property at the time the suit was instituted, cannot prevail at Law.

2d. Because there is no equity or justice in the bill. It does not appear that Greene knew what instructions he gave to the draftsman. Thirty-four years ago he seems to have received such a deed as conveyed a fee in the property to himself "*jure uxoris*;" and for that time he has maintained and supported the negroes and enhanced their value. The reformation of the deed now, would operate as an iniquitous surprise on him. He ought to occupy, and in my opinion, does occupy the same favored position with a *bona fide* purchaser without notice.

3d. Because it does not appear from the bill that the *feoffor*, Batt Wyche, though he seems to have lived many years after the execution of the deed, ever dissented from any of its provisions, or that his administrator or himself ever complained of any mistake.

4th. Because several months after the execution of the deed now sought to be corrected, it seems that Batt Wyche had it before him and did an act, (see the indorsement on the deed) which, if it is not strongly affirmatory of the deed as it stands, still shows no dissent on account of mistake.

5th. Because the great length of time which has intervened

since the execution of this deed would seem to be a very great objection now, to the interposition of a Court of Equity, in a case situated as this is, particularly as no fraud is imputed to Greene, the defendant. This is an executed gift, made and accepted and acted upon by Greene, and acquiesced in for thirty-four years by all parties; any interference of a Court of Equity to disturb the estate created by the donor, as manifested by the written conveyance, could only be productive of mischief.

6th. Because it does not appear how Greene is to be compensated for his trouble and expense in raising, clothing, feeding and nourishing thirty odd negroes, for thirty odd years. The mistake does not seem to have been insisted on, or made known by Batt Wyche, or those claiming under him, until more than thirty years had elapsed; and now to correct the mistake, and wrest the property from Greene, without compensation, would be an egregious fraud on him.

To which decision and refusal of the Court, counsel for complainants excepted.

O. C. GIBSON, for plaintiff in error.

GOODE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

This was a bill filed by Thomas F. Wyche and Adaline W. Wyche, his wife, against Thomas C. Greene, of Upson County. It stated that the complainants were intermarried in 1839; that Adaline W. is the child of Patience C. Greene, the wife of the defendant, and daughter of Batt Wyche, late of Montgomery County; that the defendant and the said Patience C. were married in 1814; and that Patience C. the mother of Adaline W. died in 1848; that Batt Wyche, in 1817, and for sometime before that date, entertained the wish and purpose, to loan to his daughter, Patience C. for her life time, four negro slaves, to wit, Sally, Moses, Ellick and Sealy, together with all their increase, previous and subsequent to that time; and at the death of his

daughter, to give the said negroes and their increase, in fee simple, to the children that were and might be born of the said Patience C. at her death, the same to be divided, share and share alike among them, immediately upon her demise; *that with the design of loaning and giving said negroes and their increase in manner aforesaid, and for the purpose of carrying the same into effect*, the said Batt Wyche, on the 15th day of February, 1817, executed a deed of gift, in the presence of W. Conner and J. G. Conner, J. I. C. of which the following is a copy:

“STATE OF GEORGIA, MONTGOMERY COUNTY.

Know all men by these presents, that I, Batt Wyche, for and in consideration of the love and affection which I have and bear unto my well beloved daughter, Patience Clark Greene and the issues of her body, do give, grant and relinquish unto the said Patience C. Greene and issue, four negro slaves, to wit, Sally, Moses, Ellick and Sealy, together with all their increase, heretofore and after these presents, the rights thereof, whatsoever, unto the said slaves and increase, to have and to hold the said slaves and increase, as aforesaid, unto the before named Patience C. Greene and issues, forever freed and cleared of, and from the claim of him, the said subscriber. In witness whereof, the said Batt Wyche has hereunto set his hand and seal, the 15th day of February, 1817.

BATT WYCHE. [L. S.]

In presence of W. CONNER,
J. G. CONNER, J. I. C.

“I make an addition to the within deed, of five hundred dollars, in place of one small negro and other things. Given under my hand, this 6th day of October, 1817. To be paid next fall.”

BATT WYCHE.

Test, WILSON CONNER, J. I. C.

“Received, the 12th of April, 1819, four hundred and fifty dollars of the above deed.

THOMAS B. GREENE.”

Wyche and Wife vs. Greene.

“Received, June 2d, 1821, in full, of the above, fifty dollars.

THOMAS B. GREENE.”

The bill further charges, that on the day when said deed was executed, or about that time, that the said Batt Wyche, for the purposes hereinbefore stated, delivered the deed of gift to Greene, his son-in-law, who received the same, to be held for the use and benefit of his wife and children; and that he did, in point of fact, so hold said deed, until the year 1824, when he gave up the same to the administrator of Batt Wyche, to be used as a voucher, or for some other purpose unknown to the complainants; and that said instrument, was found in 1850 or 1851, among the papers of George Wyche, who is now dead, but who was one of the administrators of Batt Wyche.

The bill further states, that the four negroes mentioned in the deed, were delivered, by Batt Wyche, in his life time, to Thomas B. Greene. It further charges, that the draftsman, in drawing said deed of gift, failed to use apt words, *to carry the design and purpose* of Batt Wyche into effect, as clearly set forth; and that the scrivener, in framing the instrument, made a mistake in this: that instead of loaning the negroes and their increase to Patience C. Greene, during her life, and at her death giving the property in fee simple, to the children, the writer drew the deed so as to convey the negroes to Mrs. Greene, absolutely, and the issue of her body. The bill avers that this was the result of accident; and that Batt Wyche, *at the time of executing and delivering said deed of gift, intended the same to be a conveyance by deed of gift, that loaned the four slaves and increase to Mrs. Greene, for her life only, and at her death, gave the same to her children, to be equally divided between them, share and share alike.*

The bill further charges, that Thomas B. Greene, when the deed was executed, and when he took the same, *had notice* that the deed of gift *was intended* by Batt Wyche to convey the negroes as before stated; and that Batt Wyche, during his life time, understood and believed that the deed of gift was drawn in conformity with the purpose which he had in view in executing it; and that Greene *received the deed with notice of this fact,*

and so held the same, with the negroes, for the benefit of his wife and children, as before charged.

The bill further stated, that the increase of Sally and Sealy amounted to twenty-nine in number—giving their names and description, all of which, together with Ellick, were in the possession of Thomas B. Greene, in March, 1850; that he had given Moses to Eleazur Adams, one of the descendants of his wife; that the complainants instituted their action of trover, returnable to the April Term, 1850, of Upson Superior Court, for the recovery of the said thirty-one slaves, against the said Greene, upon which a trial was had in October thereafter, when the Circuit Judge refused to allow the complainants to show the alleged mistake, and decided that the deed of gift vested an absolute title to the property in Thomas B. Greene; and that in consequence of said decision, a verdict and judgment were rendered in favor of the defendant in the action.

The bill charges, that an appeal has been entered and that the same is now pending, and which will stand for trial at the ensuing term of the Superior Court, unless restrained; and that the complainants will be compelled again to submit to a defeat, unless they can have the deed of gift reformed, so as to represent and carry out the design of Batt Wyche in making the same, at the time it was executed and delivered.

And the complainants pray for an injunction, and that the mistake in the conveyance may be corrected and the writing reformed, &c.

On the 18th of September, 1851, the bill was presented by the complainants to Judge STARK, in vacation at Chambers, for his sanction, who upon examination, refused to grant the same, assigning as his reasons:

First. Because the complainants are plaintiffs in the action of trover, in the Superior Court of Upson County, in favor of said complainants, against said Thomas B. Greene, and this bill is filed to aid the recovery at Law. If the object of the bill should be attained, and the deed of gift reformed, still the plaintiffs having no legal interest in the property at the time the suit was instituted, cannot prevail at Law.

Secondly. Because there is no equity or justice in the bill. It does not appear that Greene knew what instructions Batt Wyche gave to the draftsman. Thirty-four years ago he seems to have received such a deed, as conveyed a fee in the property to himself, *jure uxoris*; and for thirty-four years, he has maintained and supported the negroes, and enhanced their value. The reformation of the deed now, would operate as an iniquitous surprise upon him. He ought to occupy, and in my opinion does occupy, the same favored position as a *bona fide* purchaser without notice.

Thirdly. It does not appear from the bill, that the *feoffor*, Batt Wyche, though he seems to have lived many years after the execution of the deed, ever dissented from any of its provisions, or that his administrator or himself ever complained of any mistake.

Fourthly. Because several months after the execution of the deed now sought to be corrected, it seems that Batt Wyche had it before him and did an act, (see the indorsement on the deed) which if it is not strongly affirmatory of the deed as it stands, still it shows no dissatisfaction on account of mistake.

Fifthly. Because the great length of time which has intervened since the execution of this deed, would seem to be a very great objection now, to the interposition of a Court of Equity, in a case situated as this is, particularly as no fraud is imputed to Greene, the defendant. This is an executed gift, made and accepted and acted on by Greene, and acquiesced in, for thirty-four years by all parties. Any interference by a Court of Equity to disturb the estate created by the donor, as manifested by the written conveyance, could only be productive of mischief.

Sixthly. Because it does not appear how Greene is to be compensated for his trouble and expense in raising, clothing, feeding and nursing, thirty odd negroes, for thirty odd years. The mistake does not seem to have been insisted on or made known by Batt Wyche, or those claiming under him, until more than thirty years had elapsed; and now to correct the mistake and wrest the property from Greene, without compensation, would be an egregious fraud upon him.

To this refusal to sanction the bill, the complainants, by their counsel, excepted, and now allege the same as error.

Admitting the facts stated in the complainants' bill to be true, is there no power in the whole administration of justice, competent to help them?

[1.] In the *Courts of Law*, it is admitted there is none. There the written will be held, as it properly was, upon the trial of the action of trover, to contain the true agreement of the parties; and that it furnishes better evidence of their meaning, than any that could be supplied by parol.

[2.] But Chancery has a broader jurisdiction, and will open the written contract, whether executed or executory, within or without the Statute of Frauds, a conveyance of realty or personalty, to let in an equity, arising from facts perfectly distinct from the construction of the instrument itself; and whatever doubts may have existed at one time to the contrary, it is now established, on the great and essential principles of justice, that relief may be had against a *mistake* in a written contract; that such a mistake may be shown by *parol proof*, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence, or to rebut an equity. *Gillespie vs. Moon*, 2 Johns. Ch. R. 595. *Sugden on Vendors*, (7th edit.) p. 146 to 159. *Motteux vs. London Ap. Co.* 1 Atkins R. 545. *Simpson vs. Vaughn*, 2 Atkins, 33. *Langley vs. Brown*, 2 Atk. 203. *Rust vs. Barton*, 3 Bro. Ch. R. 454. 5 Vesey, 595. *Irrham vs. Child*, 1 Bro. Ch. R. 94. *Baker vs. Paine*, 1 Ves. 457. *Crosby vs. Middleton*, Pr. ch. 309. *Wiser vs. Blackley*, 1 Johns. Ch. R. 607. *South Sea Co. vs. D'Olippe*, cited 2 Ves. 317. 2 Ves. 377. 5 Ves. 601. *Pitcairne vs. Ozbourne*, 2 Ves. 375. *Fonbl. Eq. b. 1 ch. 3, §11, note o.* *Mitf. Pl.* 127. *Cloves vs. Higginison*, 1 Ves. & Beames, 524. *Ball vs. Slorie*, 1 Sim. & Stu. R. 210. *Marshall on Ins. b. 1, ch. 8, §4.* *Climon vs. Cook*, 1 Sch. & Lefr. 32. *Andrews vs. Essex, F. & M. Ins. Co.* 3 Mason R. 10. *Cook vs. Reston*, 2 Root, 78. *Elmore vs. Austin*, lb. 415. *Parsons vs. Hosmer*, lb. 1. *Sanford vs. Washam*, lb. 499. *Chapman vs. Allen*, Kirby, 399. *Lemaster vs. Buckhart*, 2 Bibb, 29. *Coyers' Ex'rs. vs. McGee*, lb. 321. *Mc-*

Wyche and Wife vs. Greene.

Curdy vs. Breathitt, 5 *Monroe*, 232. *Inshoe vs. Proctor*, 6 *Monroe*, 316. *Parcels vs. Cohesan*, 2 *J. J. Marshall*, 133. *Burdett vs. Sims*, 3 *J. J. Marsh.* 190. *Harrison vs. Jameson*, 3 *Ib.* 232. *Hunt vs. Freemons*, 1 *Hammond*, 501. *Mayfield vs. Seawell*, *Cook*, 437. *Phenix Ins. Co. vs. Gurnee*, 1 *Paige*, 278. *Rosewell vs. Fullen*, 2 *Cowen's R.* 129. *Chamberlain vs. Thompson*, 10 *Conn.* 243. *Wheaton vs. Wheaton*, 9 *Conn. Rep.* 96. *Young vs. Craig*, 2 *Bibb*, 270. *Smith vs. Smith*, 4 *Bibb*, 81. *McCrea vs. Holhis*, 4 *Dessauss*. 122. *Smith vs. Wallace*, 1 *Wash.* 254. *Gay vs. Adams*, 1 *Root*, 105. *Matron vs. Parkhurst*, *Root*, 414. *Wesley vs. Thomas*, 6 *Har. & Johns.* 24. *Samuat vs. Bowley*, *Ib.* 500. *Price vs. Fugerd*, 4 *Munf.* 68. *Newson vs. Bufferlow*, *Dev. Eq.* 379. *Wilkins vs. Woodfin*, 5 *Munf.* 183. *Lyle vs. Williamson*, 6 *Monroe*, 143. *Dunlap vs. Stetson*, 4 *Mason*, 349. *Stebbins vs. Eddey*, *Ib.* 414. *Fitzgerald vs. Peck*, 4 *Litt.* 127. *Flagg vs. Mann*, 2 *Sumner*, 487. *Wood vs. Woodrich*, 9 *Yerger*, 266. *Long vs. Israel*, 9 *Leigh*, 556. *Brown and Wife vs. Barnes et al.* 8 *Leigh*, 1. *White vs. Wilson*, 6 *Blackf.* 448. *Grate vs. Redd*, 4 *B. Monroe*, 178. 3 *B. Mon.* 573. 4 *Dana*, 309. *Lowndes vs. Chisolm*, 2 *McCord's Ch. Reps.* 455. *Champlin vs. Layton*, 1 *Edwards*, 467. *Hall vs. Reed*, 2 *Barb. Ch. Rep.* 560.

The practical application of this doctrine was not in general use in the Superior Courts of this State until a recent period; and cases have greatly multiplied under this head, since the decision by this Court, in *Rogers vs. Atkinson et al.* (1 *Kelly's Rep.* 12.) Indeed, for a long time it was strenuously resisted in England, upon the ground that it was irreconcilable with the rule of evidence at Common Law, which studiously excludes the admission of parol evidence to vary or control written contracts. But the doctrine was finally settled upon a firm foundation, for the reason, that it was indispensably necessary to suppress frauds and to promote general good faith and confidence in the formation of contracts; still, such cases are justly deemed exceptions to the rule which forbids the introduction of parol proof, to alter written contracts; and the present disposition of Courts of Equity, is to narrow, rather than to enlarge

the operation of the exception. *Stewart vs. Stewart*, 5 *Clark & Fennell*, 964, 971.

[3.] The proper inquiry in all applications like the present is, does the instrument contain the true agreement between the parties? Is it what they intended it should be? or has the draftsman, by mistake, either as to fact or as to law, drawn a different contract from the one contemplated? If so, Equity will interpose, and compel the parties to execute their true agreement, and not that which is reduced to writing. For, while Chancery has no power to make contracts for parties, or to substitute one for another, it can and will decree, that they shall reform those which they have actually made; and if the paper does not fulfil or violates their understanding, it will be rectified and made to conform to it.

[4.] As to the degree or *quantum* of proof that will be required, before relief will be granted against written instruments, the rule is not laid down with inflexible uniformity. Lord *Thurlow*, in *Shelbourne vs. Inchiquin*, (1 *Bro. Ch.* 349,) said, "that the evidence must be strong and irrefragable." But this language has been considered too strong. *Attorney General vs. Sitwell*, (1 *Yonge & Coll.* 583.) And that all that was necessary, was that the mistake should be made out by evidence clear of all reasonable doubts. Some of the authorities say, that the mistake itself should be *plain*; and that it should be *clearly* made out by proofs which are satisfactory. *Hunkle vs. Royal Assurance Company*, 1 *Ves.* 317. *Jeremy on Eq. Jur.* pt. 2, ch. 2, p. 368. *Ib.* ch. 4. p. 490, 491. *Trummond vs. Stangroom*, 6 *Ves.* 328, 339. *Gillespie vs. Moon*, 2 *Johns. Ch. Rep.* 595, 597. *Seymour vs. United Insur. Co.* 2 *Johns. Ch. Rep.* 630.

And we apprehend that this rule approximates as near to accuracy, as any that could be prescribed. For while it would be too stringent, perhaps, in the language of Lord *Thurlow*, to hold that the proof should be beyond doubt and beyond controversy, in nature and degree, incapable of refutation; still it would be dangerous in the extreme, to allow evidence which was loose, equivocal and contradictory, to add to or vary the terms of a written agreement.

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[5.] I will only add, that a Court of Equity, it has been held, will grant relief in cases of mistake, in written agreements, not only where the fact of the mistake is expressly established, but where it is fairly implied from the nature of the transaction. 1 *Story's Eq. Jur.* (4th edit.) §162, and authorities there cited.

[6.] Of course, Courts of Equity will grant relief more readily where the mistake is made to appear by reference to another writing.

[7.] Having ascertained the general rule applicable to this class of cases, let us examine briefly, the reasons assigned by Judge STARK, for withholding his sanction to the complainants' bill :

1. The first is, that if the deed of gift is reformed, still, the plaintiffs, having no legal interest in the property at the time the action of trover was commenced, it cannot avail them any thing.

We apprehend that this is a mistake; and that the title will relate back, of course, to the date of the deed in 1817.

[8.] 2. The learned Judge says, there is no justice in the bill, and he gives as the reasons for this opinion : that it does not appear that Greene knew what instructions were given to the scrivener who drew the instrument; that thirty-four years ago, he received such a deed as conveyed a fee in the property to himself, in right of his wife; and that ever since, he has maintained and supported the negroes, and greatly enhanced their value; and that therefore, the reformation of the deed now, would operate as an iniquitous surprise upon him; that he ought to occupy, and in the opinion of our brother, does occupy the same favored position with a *bona fide* purchaser, without notice.

So far as it respects the instructions given by Batt Wyche, to the draftsman of the deed, it is not indispensably necessary that Greene should have been cognizant of them. The bill charges, that the object of the donor in executing the conveyance, was to loan the property and its increase to Mrs. Greene, during her life, and to give the fee to the children at her death, to be equally divided among them, share and share alike; and that Greene

accepted it with a full knowledge of this fact, and held it for this purpose.

And I would respectfully submit, that the other suggestions are directly at variance with the allegations in the bill, all of which are taken to be true, until controverted. How, for instance, could the reformation of the title operate as an "*iniquitous surprise*" upon one who is charged *to have had notice* of its true intent and meaning, at the time he received it, and fully acquiesced in its terms and provisions, as are now sought to be established?

[9.] And if Mr. Greene is entitled to occupy the same favored position of a *bona fide* purchaser, then Judge Story has totally misconceived the relative rights of these parties. He says that Equity will interfere to correct mistakes and reform written contracts between the original parties and those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, *voluntary grantees*, (and such is Mr. Greene—the deed purporting to be founded alone upon the love and affection which the donor had for his daughter and her issues,) or judgment creditors, or purchasers from them, *with notice of the facts*. 1 Story's Eq. Jur. §165.

Would a Court of Equity refuse protection to a purchaser at a judicial sale, *with notice*, and extend it to a *voluntary grantee with notice*? And the bill, I repeat, distinctly and emphatically avers, that Mr. Greene *had notice of the facts*.

3. It does not appear from the bill, says the Chancellor, that the donor, Batt Wyche, though he seems to have lived many years after the execution of the deed, ever dissented from any of its provisions, or that his administrator or himself ever complained of any mistake.

This argument might, perhaps, be pressed with some plausibility upon the Jury on the final trial. Unfortunately, however, for the present issue, like almost every other objection which is set up, it is best answered by the bill itself. It asserts that Batt Wyche, while in life, understood and believed that the deed of gift did convey the property in the manner he intended.

But suppose he had discovered the mistake, and from an in-

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disposition to intermeddle between his daughter and his grand children, or from any other cause, failed to take the necessary steps to have it corrected, and that his administrator was equally negligent while he managed the estate, would that bar the rights of these remainder-men?

4. Again: it is said that several months after the execution of the deed, Batt Wyche had it before him, and did an act—to wit, the substitution of five hundred dollars in lieu of a portion of the property thereby conveyed—which if it is not strongly affirmatory of the deed as it stands, still, evinces no dissatisfaction on account of any mistake which had inadvertently crept into it. Counsel for the plaintiffs in error deduce a very different conclusion from this indorsement. They ask, and with some significance, why make this substitution upon *the deed* at all? If Mr. Greene took an absolute, instead of a qualified estate in the negroes, why did not Mr. Wyche give him his note for the \$500, which was to be paid in the fall thereafter, and take a relinquishment of the title to the negroes from Mr. Greene?

In truth, this transaction, in my judgment, proves but little either way. One thing is certain, it does not show, that at this time, contrary to the express averment in the bill, that a knowledge of the form of the paper, was brought home to Batt Wyche, or that his attention was called particularly to it.

[10.] 5. Another ground for not granting the injunction, is that the great length of time which has intervened since the execution of this deed, is a cogent reason now, against the interposition of a Court of Equity in a case situated as this is, particularly as no fraud is imputed to Greene, the defendant; and that to disturb the estate, as manifested by the paper title, could only be productive of mischief.

It is certainly true, that the title to relief against a *mistake*, or for any other cause, may be forfeited by acquiescence or unreasonable delay. *State of Rhode Island vs. The State of Massachusetts*, 15 Peters, 233. 4 Howard, 591. In this case however, the possession had continued undisturbed for *two hundred years*, under the assertion of right, with the claim in the

meantime admitted by the province alleging the mistake, and by other colonies, in the most solemn manner.

In *Westbrook vs. Harbeson*, (2 *McCord's Reps. in Ch.* 118) it was held, that the Court would not *readily* correct mistakes after a lapse of time.

It becomes important then to ascertain ~~at what time the right accrued~~, to move in this matter. Mrs. Greene, the mother of the complainants, and who had a life estate in the property, died in 1848; and in April, 1850, the action of trover was brought to recover the negroes, and the bill to reform the title was presented for sanction on the 19th day of September, 1851. We should not be inclined to consider three years an unreasonable delay, under the circumstances; more especially, as the bill charges, that Greene retained the possession of the deed till 1824, when he gave it up to the administrator of Batt Wyche, to be used as a voucher, or for some other purpose, unknown to the complainants; and that it was not found till 1850 or 1851, when it was discovered among the papers of George Wyche, who was then deceased, but who in his life time, was one of the administrators of Batt Wyche.

Thomas B. Greene took the deed, according to the charge in the bill, ~~not as made~~, but as it was intended to be made. The children acquiesced in the deed, and in his possession under it, in like manner. Mere lapse of time is nothing, unless there is an adverse possession, or claim set up to the property, adverse to the title of the other party. Up to the death of Mrs. Greene, her husband was entitled to the possession of the property, even under the deed, as sought to be corrected. The time that elapsed between the death of Mrs. Greene and the filing of the bill to reform the contract, would not even constitute a good statutable bar.

It is assumed, that no fraud is imputed to Greene. The bill charges, that the true terms and stipulations of the gift, were mis-stated in the conveyance, contrary to the intention of the donor. To allow Mr. Greene to avail himself of it, would it not be a gross injustice and equivalent to a positive fraud?

But the jurisdiction which is here invoked, does not depend upon fraud, but accident and surprise.

[11.] 6. The last reason assigned for refusing the application, is that it does not appear that Greene is to be compensated for his trouble and expense in raising, clothing, feeding and nursing thirty odd negroes for thirty odd years; that the mistake does not seem to have been insisted on or made known by Batt Wyche, or those claiming under him, until more than thirty years had elapsed; and now, to correct the mistake and wrest the property from Greene, without compensation, would be an egregious fraud on him.

As to the non-intervention of Batt Wyche, in his life time, or of his minor grand-children, since his death, I have already endeavored to obviate that objection. But if Mr. Greene chose to accept of a life estate in the negroes, as the bill repeatedly alleges that he did, what claim has he upon the remainder now, for compensation during the continuance of the life estate? He acted voluntarily and not by compulsion.

But allow that he is entitled to remuneration, all this will be a proper matter for the consideration of the special Jury—either upon the issue as made by the plaintiffs, or as it might perhaps be more properly presented, upon a cross-bill, filed by Greene.

The lapse of time seems to have been the stumbling block, to the mind of the Judge, in every aspect in which he viewed this case. While it is manifestly no bar to the relief which is sought, it should undoubtedly impose upon the Court and Jury an additional obligation, to scrutinize closely the testimony upon which this claim is to be established. The mistake should be made out by the clearest and most unequivocal evidence. The averments in the bill are so perfectly explicit, as to preclude all doubt. The proof should be equally satisfactory. If the Courts are slow at all times in exerting their authority to reform written instruments, much more cautious should they be to exercise their jurisdiction, under the facts and circumstances of this case, when a portion of the original parties have gone hence, and material changes have taken place in the relations of those who survive.

There may be some reason, from the face of the paper itself, and from extrinsic proof, to presume a mistake; that should not be sufficient. The evidence ought to be decisive—not that which hangs equal or nearly in *equilibrio*. ~~Antecedent loose conversations, recollected at this distance of time, should be entitled to little or no weight. They should rather be deemed to have been merged in the more deliberate results of the written conveyance.~~

[12.] Regarding then, the grounds assigned for rejecting the application, as erroneous, is there any thing on the face of the bill which will justify *the decision*? If so, the judgment should be affirmed. We would regard these grounds in the light of bad reasons, given to sustain a correct decision; and for the giving of which, a revisory Court should never reverse the judgment, unless the party has been prejudiced thereby.

[13.] It is contended in argument, that the representative of Batt Wyche should have been made a party to the bill; and further, that the bill would have been demurrable on account of this omission. That is not a sufficient reason for refusing to sanction the bill. If found necessary, it could have been overruled in this particular.

[14.] Again: it is said, that the bill does not allege that the property was delivered under and by virtue of the deed of gift; and the fact is supposed, by counsel, to have been otherwise. Admit this to be true. To transfer property by gift, there must be a deed or instrument of gift, *or*, there must be an actual delivery of the thing to the donee. Both are not requisite. 2 *Barn. & Ald.* 551. 2 *Black. Com.* 441, (note 5.)

And conceding that the conjecture is well founded, namely: that these slaves went into the possession of Greene, upon his intermarriage with Patience C. Wyche—the law thereby raising the presumption of a gift—was it not competent for him, three years thereafter, to agree with the father of his wife, that he took the property as a loan merely, to be used and enjoyed for and during the life of his wife, and to be equally divided between the children at her death? And would not Greene be es-

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topped, by this acknowledgment, from setting up a previous gift? But it is unnecessary, at present, to decide this point.

Without pursuing the discussion further, we are of the opinion that the decree of the Chancellor, refusing to sanction the bill, should be reversed; and that the same should be granted, according to the prayer of the bill.

No. 27.—N. B. GOODWYN, plaintiff in error, vs. NANCY GOODWYN, defendant in error.

[1.] Process signed by a Deputy Clerk of the Superior Court, is as valid and sufficient in law, as if signed by the principal Clerk.

Trover, in Coweta Superior Court. Decided by Judge HILL, September Term, 1851.

The process attached to the declaration in this action, was not signed by the Clerk of the Superior Court, but by "Charles E. Tuft, Deputy Clerk."

On the trial on the appeal, counsel for defendant demurred to the sufficiency of the process, on the ground that it was so signed.

The Court sustained the demurrer, and ordered a non-suit to be entered in the said cause. To which decision counsel for plaintiff excepted.

MCKINLEY & BUCHAN, for plaintiff in error.

SIMMS, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made in this case, is as to the validity of the process, which is signed by "Charles E. Tuft, deputy Clerk." By the 8th section of the Judiciary Act of 1799, it is provided, that the Clerk shall annex a process to the plaintiff's petition, signed by such Clerk; and it is also declared by that Act, that all process issued and returned in any other manner than therein required, shall be null and void. *Prince*, 420, 421.

By the Act of 1817, Clerks of the Superior Courts in this State are authorized to appoint deputy Clerks, in the same manner and under the same rules and regulations as deputies of Sheriffs are by law appointed. This Act also provides, that the principal Clerk shall be, in *all cases*, responsible for the acts of his deputy and *agent*. *Prince*, 180. When we take into consideration the *object* of the Act of 1817, as manifested by the preamble thereto, as well as the provisions of the Act itself, it is difficult to perceive why the signature of a deputy Clerk to a process, is not, for all legal purposes, to be considered as *the act of the principal Clerk*. The deputy Clerk is the mere *agent* of his principal, and is so recognized by the Act of 1817. The principal Clerk is responsible for all the acts of his deputy. Whatever doubts may have existed heretofore in regard to the intention of the Legislature in the Act of 1817, the late declaratory Act of the last Legislature, removes all doubt as to such intention. This latter Act declares, that process signed by the deputy Clerk, shall be as sufficient in law, as if signed by the principal Clerk.

Let the judgment of the Court below be reversed.

No. 28.—MOSES MOUNCE, plaintiff in error, vs. JAMES BYARS et al. defendants.

- [1.] An amendment to the answer, by way of supplement, in Equity, will be allowed, upon the ground of mistake as to facts stated in the original answer—more particularly where the correction is not prejudicial to the complainant.
- [2.] In causes in Equity, according to the laws of Georgia, the facts are to be submitted to a special Jury, who have the exclusive right to pass upon them; and all questions of law are for the determination of the Court alone.
- [3.] It is competent for the Judge to dismiss a bill at the trial, upon the ground that the complainant has introduced *no evidence whatever*, to a point which, according to law, he must prove, to entitle him to recover.
- [4.] In a bill filed against subsequent purchasers, to enforce the vendor's lien, the Court may dismiss the bill at the trial, if there is *no evidence whatever* of notice of the lien.
- [5.] If, upon a trial in Equity, on a bill to enforce the vendor's lien, there be any evidence, however slight, to sustain the plaintiff's case, the cause ought to be submitted to the Jury.
- [6.] Notice of the lien of the vendor, brought home to the agent of the purchaser, is constructive notice to the purchaser.

In Equity, in Butts Superior Court. Tried before Judge STARK, September Term, 1851.

The bill charges, that in 1839, he was owner of one hundred and twenty-two acres of land, divided into several lots, and known as a part of the McIntosh or Indian Spring Reserve, situated in the County of Butts, which he had purchased of one Robert Coleman, who had purchased them at public sale, previously made by commissioners appointed by the authority of the State, for that purpose; that Coleman had paid the several instalments due the State for said land, the receipt of which payments was indorsed upon the certificates of sale, given by said commissioners; that Coleman transferred said certificates to the complainant, for a fair and valuable consideration; that complainant, on the 13th day of November, 1839, sold the said land to James Byars, for the sum of \$1300, for which he took

Byars' notes, the last one of which fell due the 1st of January, 1842; that at the time of filing the bill, there remained due to complainant of said purchase money, the sum of \$925 42 cents, principal and interest.

The bill charges, that at the time of the sale, no grants had issued to said lots of land, except lot number forty, to which complainant executed to defendant a deed in fee simple, and that he transferred to defendant the said certificates of sale of the other lots; that the defendant went immediately into possession of said lots, under the said sale.

The bill charges, that in 1839 or 1840, defendant sold the said lots to one William Byars, his brother, who resides in the County of Butts; and that immediately after said sale, the defendant, James Byars, ran away and left the State; and that in a short time, the said William Byars sold, or pretended to sell, said lots to Richard G. Byars and John Goodman, both of Butts County, and who are now in possession of said lots; that at the time James Byars left the State, he carried all his property and effects with him.

The bill charges, that complainant took no security on the notes given for the purchase money of said lots of land.

The bill also charges, that William Byars, Richard G. Byars, and Goodman, at the time they purchased the said lots of land, had notice, and were apprised of the fact that the defendant, James Byars, had not paid complainant the purchase money for said lots of land.

The bill prayed that the Court might decree the sale of the land and order the proceeds to be applied to the payment of his debt against James Byars.

The defendants, William Byars and John Goodman, filed their answers, denying that at the time they became the purchasers of said lots of land, they had any knowledge or notice of the purchase money, or any part thereof, remaining unpaid to complainant, by the defendant, James Byars, &c. &c.

The defendant, Goodman, in his answer stated, that in the spring of 1840, he purchased of William Byars, two of the said lots of land, numbers 66 and 67, and received from him the

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original grants from the State and a deed in fee, conveying said lands. Goodman denied all knowledge or notice of the purchase money remaining due to complainant, from James Byars for said lots, &c.

The defendant, James Byars, having failed to answer, the bill on the trial was taken *pro confesso*, as to him.

On the trial, before the cause was submitted to the Jury, the defendant, Goodman, moved the Court to amend his answer, in substance and effect, as follows: "that the contract for the purchase of the two lots, marked 66 and 67, was originally made by this defendant, with James Byars, with the consent of William Byars; but that he subsequently received the grants of the State and a deed in fee simple, from William Byars," &c.

Counsel for complainant objected to the filing of the amending answer, on the ground that it contradicted a sworn answer previously filed by the amending party, in a material point, by stating facts which might have been stated in the original answer.

The objection was overruled by the Court, and counsel for complainant excepted. On the trial, Joel Byars, sworn—stated, "that he heard a conversation between Richard G. Byars and William Byars. Richard bought the half of lot of land, called the King Place, of William Byars, at the price of \$600. Richard, in 1840, wanted to dispose of the King Place and wanted a place nearer the Springs. James Byars offered to swap with Richard, a part of the land he got of Mounce, and asked Richard \$150 to boot. Richard offered him \$50. Richard got witness to make the trade with William; and after Richard went home to Cherokee, William came to witness and told him to hold on, he would arrange the trade, and let witness have the Mounce place, for he wanted the King Place back again. And after that, William came and carried witness with him to James Byars, and told James that he was going to let me have the land for Richard. James Byars' wife remarked, "you had better let Mounce have his land back, for she knew he, James, would

never be able to pay for it; whereupon they all became angry," &c. &c.

After complainant closed his testimony, counsel for defendant moved to dismiss the bill.

Which motion was sustained by the Court, and counsel for complainant excepted, and upon these exceptions have assigned error.

HAMMOND & HARMAN, for plaintiff in error.

JNO. FLOYD, for defendants in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] It does not appear on the record, that the defendant made known to the Court, when he asked leave to amend, what he expected to put in his amended answer, and that the application was accompanied with affidavits. These things are indispensable. But it was conceded in the argument, that this rule was, in fact, complied with. The strictest guard should be held upon amendments to sworn answers. Laxity here might work consequences the most disastrous to the administration of justice. The Court should be informed, before allowing an amendment, what the original answer is, and what new fact or circumstance is proposed to be added, or wherein and to what extent the original answer is proposed to be modified; and the application to amend, ought to be supported by affidavits. These amendments are, like others, within the discretion of the Chancellor. This discretion in these cases, however, is extremely limited in its range. They should not be permitted, unless it is palpably clear, that they are necessary to advance the ends of justice. Rarely, very rarely, ought an amendment to be allowed, when the addition or alteration is prejudicial to the interest of the complainant. The principles upon which the doctrine of amendments to answers, in Equity, is based, were carefully considered by this Court, in *Martin vs. Atkinson*, (5 Geo. R. 390;) and it suffices, therefore, to refer now to that

case. We there held that an amendment would be allowed, to correct a clear mistake in a matter of fact, discovered after the filing of the answer. The more readily will a mistake be corrected, when the correction does not vary the case, so as to make it more strongly against the complainant. We learn from this supplemental answer, that its object was to correct a mistake of fact—it states the mistake and corrects it, by stating the facts truly. The correction is not prejudicial to the plaintiff in the bill. The bill is filed against several defendants, to enforce the vendor's lien. One of them, *Goodman*, states in his answer, that he bought his lands, upon which the lien was sought to be enforced, from *William Byars*, (who, the bill charges, was a purchaser from the complainant's vendor, *James Byars*;) and that he paid the purchase money, in part, in satisfaction of a debt, owing by *James Byars* to him, and the balance was paid to *William Byars*, to be applied to a debt due by *James Byars* to *Wm. Jones*, and upon which *William Byars* was security. The mistake is in the statement, that he bought the land from *William Byars*, and paid over to him the balance of the purchase money. The defendant corrects it by saying that he bought from *James Byars*, with the consent of *William Byars*, and that he paid the balance of the purchase money to *James Byars*. He explains the transaction in the supplemental answer at large. The substance of the explanation is, that *William Byars* had an equitable interest in the lands, being holder of the certificates transferred to him by *James Byars*; that the defendant preferred to take a title from *William Byars*; and buying from both *James* and *William*, it was agreed that the grant should issue to *William Byars*, and that he should make a deed to the defendant, which was done; and after paying the debt due to him by *James Byars*, he paid the balance of the purchase money to him, *James Byars*, and not to *William*, as at first stated. Looking at the whole case, we do not see that this alteration of the original answer, changes the character of the controversy materially, between the complainant and any of the defendants. It presents truly the relations between *Goodman* and the *Byars's*, relative to the purchase of the lands; and disburdens the con-

science of *Goodman*. These were, no doubt, the objects which the amendment was intended to effect. It was, we think, properly granted.

The presiding Judge dismissed the bill at the hearing, upon the ground that there was *no evidence* to show that any of the defendants had notice of the complainant's lien. Upon this ruling of the Court, the complainant excepted, and the bill of exceptions makes two points:

First. It is claimed, that if it be true, that there is no evidence of notice, yet, in Georgia, the Chancellor has no power to dismiss the case.

Second. That there *was* evidence of notice sufficient to take the cause to the Jury.

The first claim assumes, that in this State, the powers of the Judge and of the Jury, in causes in Equity, are joint. This assumption goes the length of saying that the Judge can render no judgment on the law, without the concurrence of the Jury; that in this case, for example, the Judge could not order the dismissal of the bill, upon the ground that the complainant had introduced no evidence to a fact material in law to be proved, without a decree of the Jury, finding, that for *that* reason the bill should be dismissed.

[2.] This assumption, that there is a union in the Judge and Jury, of all the powers of a Court of Chancery, involves also, this other and farther consequence, to wit, that the Judge may and indeed ought to unite with the Jury, in determining upon the facts; and that they can no more decree, as to them, without his concurrence, than he can decree on the law without their concurrence. That there has prevailed in Georgia, opinions thus extreme, we are not ignorant. To these opinions we can give no countenance. *We hold, that in Equity, as at Law, the province of the Jury is to try the facts; and that the Judge has no more right, in Equity, to pass upon the facts, than he has at Law; and that it is the province of the Judge, in Equity as at Law, to adjudge the law; and that the Jury have no more power to pass upon the law of the case in Equity, than they have at Law.* The functions of Judge and Jury are separate. Courts of Equity

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have, in this State, general jurisdiction, according to those principles of Equity, by which the same jurisdiction is exercised in England. We adopted the principles of Equity, as understood in England, as well as the rules of the Common Law, strictly so called, and with the same limitation. We adopted the Equity Jurisprudence of Great Britain as a system, so far as it was suited to our circumstances, and not repugnant to the genius of our institutions. Wherever and to whatever extent that system is changed or modified by Statute, of course the Statute is the law. *Beall vs. the surviving executors of Fox*, 4 Geo. Rep. 404. The character of the tribunal and the mode of trial have been changed; and the great change of the character of the tribunal and the mode of trial, consists in this, that a Jury, with exclusive power to find the facts, is substituted in lieu of the Chancellor or a Master, in England. This substitution also dispenses with the usage of the Courts of Chancery in England, of sending cases, in particular instances, down to the Courts of Law, to find the facts. I think it is clear, from our own Statutes, that the Jury was introduced into our Chancery Courts, for the purpose alone of deciding on the facts; leaving the Judge clothed with supreme authority over the law, as in England. Here, so far as the law is concerned, the Judge is the Chancellor; and so far as the facts are concerned, the Jury are the Chancellor. Just in the sense are they the Chancellor in Georgia, that the Judge is Chancellor in England, when in the exercise of his rightful authority there, of determining facts. It is in this light that it may be properly said, that in Georgia, the Judge and the Jury constitute the Chancellor. And this, and no more is meant, when, in *Hargraves and another vs. Lewis*, the Judge writing the opinion, says, "in Georgia, the Judge and the Jury constitute the Chancellor." (3 Kelly, 169.) This substitution was made by the Act of 1792, which was repealed by the Act of 1797, which re-enacted the provision of the former Act in reference to it. It is from these two Acts that we derive the powers of a Jury in Equity causes. It is very remarkable, that the Act of 1799, which repeals the Act of '97, in relation to the Equity powers of the Superior Courts, is itself

silent about a Jury trial at all, in Equity. It makes specification of the Chancery powers of the Superior Courts, and proceeds to declare, "and the proceedings in all such cases, shall be by bill and such other proceedings as are usual in such cases, until the setting down of the cause for trial; and the Courts shall order the proceedings in such manner as that the same shall be ready for trial, at the farthest, at the third term from the filing of such bill, inclusive, &c." Now, there is no express authority for the intervention of a Jury in this Act of '99. It pursues the tenor of the two Acts of '92 and '97, in relation to the *proceeding*, until the setting down of the cause for trial, and at that point, drops the provisions of these two Acts. By designating the proceedings, and declaring that they shall be by bill, and such other proceedings as are usual in such cases, until the cause is set down for trial, it is clear that the Legislature meant to adopt such proceedings up to that time as are usual in the Chancery Courts of Great Britain, whose general Chancery Law it had previously adopted, by the Act of 1794; and it is also inferrable, that after that time, it contemplated some mode of trial *different* from what was usual in such cases in the English Courts. But, I repeat, that it is a singular and unaccountable fact, that this Act, which is confessedly a reorganization of the Judiciary system of the State, and which, in terms, repeals the Act of 1797, should not declare in what that difference should consist, and how the trial should be conducted. As this was a new jurisdiction, cast upon the Courts of Law, when already the trial by Jury obtained in trials at Law, it would be possible to infer that the Legislature intended trials in Equity to follow the course of trials at Law; and thus, by construction, derive Jury trials in Equity, from the Act of 1799. Such derivation is not very satisfactory to my mind. But we are not left alone to the Act of 1799. Although the Act of '97 is repealed by this Act of '99; yet, its provision as to the powers of a Jury, in Equity causes, is saved by the Constitution of '98. I mean to say, that if the Act of '99 be admitted to have repealed the Act of '97, in relation to the trial of causes in Equity, by a Jury, and thereby abrogated the trial

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by Jury in Equity, that, *pro tanto*, it is void, because repugnant to the Constitution of '98. That Constitution declares, that "trial by Jury, as *heretofore used* in this State, shall be inviolate." Now, the Act of 1797, which re-enacted the Act of '92, was in force when the Constitution of '98 was adopted. By the Acts of '92 and '97, the trial by Jury *was used* in this State in Equity causes, and it was used as prescribed in those Acts. Any law, therefore, passed subsequent to the Constitution, which repealed those Acts, and defeated the usage of trial by Jury, which they prescribed, is void. Thus it is, that the trial by Jury, in Equity causes, is derived from the Acts of '92 and '97. *Hargraves vs. Lewis*, 7 Geo. R. 125. *Dudley's R.* 8. *Cobb's New Dig.* 467, 1143.

And it is upon this process of reasoning alone, that appeals were sustained in Equity causes; for there is no law which authorizes them, since the Act of 1797, until the Act of 1843. The right of appeal, given by the Act of 1799, has been usually conceded—and it seems to me, necessarily conceded—to refer to cases tried at Law. These remarks about appeals being parenthetical, I proceed to inquire—having traced the trial by Jury, in Equity, to the Act of '97—what, according to that Act, are the relative powers of the Judge and the Jury. The Act of 1792, and also the Act of 1797, provides, that "the Superior Courts shall be competent to sustain a suit, by bill and proceeding therein, until the setting down of the cause for hearing; such Superior Courts shall then submit the merits of the suit, with the evidence thereon, which, in all cases, shall be given *viva voce*, (or otherwise, within the rules of the Common Law;) and all matters respecting the same, to a special Jury, who shall give their verdict on the same; but if either party shall be dissatisfied with such verdict, an appeal may be entered in the Clerk's office within ten days after trial, when a hearing of such cause shall again be had before another special Jury, and such trial shall be final and conclusive." *Watkins' Dig.* 480, 621, 622. The Act of 1799, so far as it relates to the action in a cause *before* it is set down for a hearing, although somewhat variant in its verbiage, is in substance, the same

with the Act of 1797. The latter Act declares, that it shall be competent for the Courts to *sustain a suit by bill and proceedings therein, until, &c.* The former Act declares, that "the proceedings, in all such cases (cases of equitable cognizance) shall be by bill, and such other proceedings as are usual in such cases, until, &c." So far as this clause is concerned, having reference to the action of the Court and not of the Jury, the Act of 1799 is the law. For the purposes of construction, however, it is competent to consider the clause in the Act of 1797, in connection with the clause quoted from the Act of 1799. For, although repealed, an Act in *pari materia*, may be, for that purpose, considered. The clause, then, in the Act of '99, viewed in the light which is shed upon it by the Act of '97, is clearly intended to prescribe the manner of proceeding, *by the Court*, in carrying out the jurisdiction in Chancery, which that Act enforced, up to the setting down of the cause for trial. The mode prescribed, is by *bill* and such *other proceedings as are usual in such cases*. *Such cases* refer clearly to all the cases of Equity jurisdiction enumerated, and to all cases originating under the general jurisdiction, which, according to the decision of this Court, this Act confers. This is necessarily inferrable; because, the Act declares that the Superior Courts shall exercise the *powers* of a Court of Equity, in all cases where a Common Law remedy is not adequate; proceeds to enumerate certain cases, in which the powers of a Court of Equity shall be exercised; after which, it provides, that in *all such cases*, the proceeding shall be by bill and such other proceedings as are usual in *such cases*. That is manifestly cases in Chancery, over which the Courts are vested with jurisdiction; for the last use of the words *such cases* has reference to the cases referred to in the first use of the same words, and their first use is in reference to the cases of jurisdiction. The proceedings are to be by bill, and such other proceedings as are *usual* in such cases. That is, the *bill* of Courts of Equity and the other proceedings *usual* in Courts of Chancery in England and, in the State, prior to that time. I have already said that the Chancery law of Great Britain had been adopted—we had no other Equity system but that—we had no Co-

lonial or State legislation, prescribing proceedings in Chancery ; and there is no escape from the conclusion, that in the Act of '99, the Legislature adopted, to the extent that it was applicable to our circumstances and the character of the tribunal, the Equity *practice* of England. Again: it is manifest, that in investing the Superior Courts with the jurisdiction, they clothed them with authority to exercise it, not only according to the *forms* of Chancery proceedings in England, with the limitation stated ; but also, according to those principles of Law, in obedience to which, that jurisdiction is there exercised. Nor can it be questioned, but that up to the setting down of the cause for trial, they intended the Court to exercise the jurisdiction, independent of a Jury. The Act of '97 is peculiar in its terms : it declares that the Superior Courts shall be competent to *sustain* a suit by bill, &c.

If the *Court* shall *sustain* a suit, that is, do all that is necessary to be done (pass such orders and pronounce such judgments or decrees) to conduct the suit forward to the trial, it is not until the suit is ready for trial, that any mention is made of a Jury ; it is at that point, and not anterior to that point, that the Jury intervenes. Before that time, without question, the Court is left to sustain the jurisdiction without the Jury. It is when the cause is set down for trial, that the Statute invokes the co-operation of the Jury. What then, at the trial, are the powers of the Jury ? As the Act of '99 is silent upon the matter of the Jury altogether, we are remitted to the Act of '97, for the answer. By that Act, when the cause is set down for trial, it is made the duty of the Court to *submit the merits* of the suit, with the *evidence thereon*, and all matters *respecting the same*, to a special Jury, who shall give their verdict *on the same*. The Jury are brought in for the purpose of the *trial*. According to the Act of '97, it is where the cause is set down for a *hearing*, that the case is to be submitted. In the same connection the Act of '99 uses the word *trial*. I remark, first, that the powers of the Jury are limited to the determination of the facts ; *because*, the Statute, in the use of the word *trial*, means the *trial* of the facts. I do not mean to say that when a case is set down for a hearing, in

Chancery parlance, there is nothing to try but the facts; for whilst it is true, that the issue on the facts is usually there the first and most important one to be tried; yet it is also true, that questions of law may, and do generally arise for decision. But I mean to say, that the word, as used in the Act of '99, in connection with the duties prescribed for a Jury, in the Act of '97, are to be taken as indicating for the Jury a trial of facts; because, the usual Common Law meaning of *trial*, without farther designation, is the examination, before a competent tribunal, according to law, *of the facts put in issue in a cause.* See 4 *Mason*, 232.

The matter submitted to the Jury, is the *merits* of the suit. The merits of a suit usually mean the rights of the parties, on the issues made in the pleadings, as distinguished from technical grounds of exceptions to the pleadings, or merely legal grounds of objection to the plaintiff's case, or defendants' defence. Here, merits is used to designate the rights of the parties, growing out of the issues as they are made in the pleadings, so far as they depend upon the facts to be proven. These rights or merits are to be submitted to the Jury. They are to determine those rights, by determining upon the evidence. This is clear from the further requirement of the Statute, that with the merits, *the evidence thereon*, is also to be submitted to the Jury. The evidence *thereon*, is the evidence on or in relation to the merits. There is no other sensible construction but this. *Legal merits* cannot be contemplated; because, questions of Law may grow out of, but are not determinable by the production of evidence. The laws live in the Statute book—in recorded opinions—in the works of venerated sages, and in the mind of living authorized administrators. Merits of fact are determinable by the production of evidence. The Act further requires that *all matters respecting the same*, shall be submitted to the Jury. This plenary clause is restricted in its generality of meaning, by its antecedents. It does not mean all matters respecting the suit, but all matters respecting the merits and the evidence. It is upon the merits referred to, as *the same*, upon which the Act finally requires the Jury to render their verdict. Here then is

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the power of the Jury—it is derivable from no other source. It is a power over the facts, and no more. That power is taken from the Court—there is no pretence from this Statute, that he is left with any such power. He is not co-ordinate with the Jury as to them. I cannot consent to let in the aid of implication, to clothe the Jury with legal powers. A power so fundamental—so inappropriate to the Jury, and in my judgment, so destructive, in their hands, of the efficiency and utility of a Court of Chancery as this is, I cannot derive from inference. The Legislature must grant it in terms, before I can recognize it. I am very well assured that they did not intend to grant it in this Act. If they had purposed to introduce so vital a change into the Chancery system as this, is it not the most reasonable of all conjectures, that they would have made it in clear, precise, unmistakable language. The submission of the facts to a Jury in Equity causes, was quite a change itself. A submission to them also, of the law of the case would have been a bold, bad step backward. The able lawyers who framed the Acts of '92, '97 and '99, and the wise statesmen who adopted them, intended, in our judgment, to do no such thing. Having given to the Jury the trial of the facts, after the cause was set down for a trial, and no more, *the Court was left on the trial, with all the powers that belong to the Chancellor, except that*; the most important of which, is the power to declare the law. Such are the views of this Court on this question—views which, so far from being new, are sanctioned by the long continued usage of our Courts, and by the opinions of the most distinguished Jurists of the State. The question being made in this case, we have endeavored to give the reasons of our decision on it, with some carefulness.

[3.] It only remains to say, that it is clearly within the competency of the Chancellor to dismiss a bill on the trial, if there is *no* evidence to a point, which the law makes it necessary for the complainant to prove, before he can recover. Notice of the complainant's lien, to the defendants, or one of them, is indispensable to his recovery; without that, he has no standing in Equity.

[4.] If there was *no evidence* of that fact, in Law, he was not

entitled to recover; and it was competent for the Chancellor so to decide, without the intervention of a Jury.

[5.] But if there was any evidence, however small, the cause ought to have been submitted to the Jury. I proceed to inquire whether there was or not.

[6.] Looking carefully into the record, we find that there is some evidence that the defendant, Goodman, bought with notice; and also, that the defendant, Richard Byars, bought with notice. It is slight, very slight, as to the former. If there be any though, at all, the cause ought not to have been dismissed—any of any kind. There may be no positive testimony, and yet, from the facts proven, the Jury may infer notice. Knowledge that the purchase money had not been paid to the complainant may be carried home to the defendant by circumstances. It is not for the Court to weigh the evidence, and deciding that no notice is proven, dismiss the cause. That right was not assumed in this case, for the Judge dismissed the bill because there was *no evidence* of notice. James Byars was the purchaser from the complainant. The certificates for these lands, being fractional reserves, sold by the State, were transferred by the complainant to him, as evidence of title. They were afterwards placed in the hands of William Byars, as he, William, states, as a security, for a liability which he was under for James. Goodman, in his supplemental answer says, that his contract for the purchase of lots Nos. 66 and 67, being part of the land bought by James Byars, from the complainant, was made with James Byars, with the consent of William Byars; and that William offered to turn over to him the certificates of purchase, and that he refused to accept them; that William then consented that the grants should be issued to him, and he convey to him, (Goodman) which was done. The refusal to take the certificates, which were the evidence of James Byars' title, shows a want of confidence, for some reason, in the safety of a title from him. The arrangement made, that the grants should be taken out in the name of William, and that he should then convey to Goodman, is confirmatory of this want of confidence. What was the ground of this want of confidence does not appear. It may have sprung from a knowledge of the

fact, that James Byars had not paid for the lands, or from some other cause. These statements have some bearing upon the question of notice. It is proper that they be submitted to the Jury, in connection with all other facts in the case, for their consideration.

Richard Byars was also a purchaser of some of these lands. Joel Byars testifies, that he acted as agent for Richard, in effecting the purchase. He says that William Byars had sold to Richard, a tract called the *King Place*, which William wanted to get back; and proposed to the witness, as the agent of Richard, to swap a part of the land, which the complainant had sold to James Byars, (the certificates to which, as before stated, had been transferred to William by James) for the *King Place*; that he, witness, and William Byars, went to James Byars', and William told James that he was going to let witness have the land for Richard; and Polly (James Byars' wife) said, "you had better let Mounce, (the complainant) have his land back, for she knew that James would never be able to pay for it; and then they all got very mad, and she got mad; and after some farther conversation, James said there was no chance for him to give Mounce the land back, for Mounce had traded off some of the notes. James said that Mounce never had and never would lose any thing by him. We then swapped land. I, as agent for Richard Byars, swapped the *King Place*, and gave fifty dollars to boot for the part Mounce had sold to James Byars; and for a four acre lot that James owned before he made the purchase of Mounce." The same witness testifies that the deed for these lands was made to him, (as agent for Richard Byars) *after* this conversation with James Byars. By this testimony, Richard bought these lands of James Byars—he made the exchange for William's benefit; but it seemed to be conceded between the parties, that James had the right of disposing of the Mounce lands. This testimony clearly charges Joel Byars, the agent of Richard Byars, the purchaser, with notice that James Byars had not paid the complainant for the lands. Notice to the agent is constructive notice to the principal. *Com. Dig. Chancery, 4 c. 5 and 6. 2 Fonbl. Eq. b. 2, ch. 6, §4. 2 Eden's R. 224, 228.*

2 Vern. 609. *Sugden on Vendors*, ch. 17. 4 *Wheat. R.* 466.
2 *Story's Eq.* §408.

Upon this ground, let the judgment be reversed.

No. 29.—JOHN C. SIMMS, administrator, &c. plaintiff in error, vs.
OTIS SMITH, defendant in error.

- [1.] Parol testimony is incompetent to vary a trust in chattels, which is manifested in writing; where, however, the trust is discretionary, parol evidence may be admitted to show how that discretion was exercised.
- [2.] Some general observations, as to the mode of citing authorities in the Supreme Court.
- [3.] Where a trust is executory and acknowledged as a continuing, subsisting trust, there is no starting point for the operation of the Statute of Limitations; and it never will begin to run, until the trust is terminated by the separate act of one of the parties, or the joint act of both.
- [4.] In Equity a re-hearing will sometimes be ordered upon terms, although in strictness no rule of law has been violated on the trial, provided it manifestly appear from the record, that on account of the rejection of testimony, the party prevailing has obtained an unconscientious decree.

In Equity, in Coweta Superior Court. Tried before Judge HILL, September Term, 1851.

This was a bill filed for discovery, account and settlement.

The bill charges, that on 20th day of January, 1840, complainant placed in the hands of Thomas C. Brown, notes on solvent persons, amounting in the aggregate to about \$6000, for which Brown executed the following receipt:

“Received, January 20th, 1840, of Otis Smith, the following notes, to be disposed of in such manner as my judgment may dictate, for which I am to return an account to said Smith when called for.” The receipt specifies the notes, and is signed,
“T. C. BROWN.”

The bill charges, that owing to the pressure in the financial condition of the country, the said Brown realized a large amount from said fund, by means of shaving paper, and loaning at usurious interest, and that said fund was received by Brown, and held and used by him in trust, and for the use and benefit of the complainant; that being satisfied with the profit Brown was realizing from said fund, he did not call on him for a settlement, until a short time before Brown's death, which occurred in the year 1847. Brown then promised to come to a settlement, and appointed a day for that purpose, but his feeble condition prevented its execution.

The bill charges, that Simms had been appointed administrator on the estate of Brown, by the Court of Ordinary of Coweta County; and that complainant had frequently called on Simms for a settlement, which had been refused.

The bill prays that Simms, as administrator, &c. may come to an account and settlement with complainant, &c.

The defendant filed his answer, in which he pleaded an account and settlement between his intestate, Brown, and complainant, and also insisted upon the Statute of Limitations.

On the trial, complainant introduced witnesses, among them William Dougherty, to prove that Brown had admitted that he was using funds for the use and benefit of complainant, &c. To which testimony, counsel for defendant objected, on the ground that such evidence enlarged and varied the written contract between the parties, to-wit: the receipt.

The objection was overruled by the Court, and the evidence admitted, and counsel for defendant excepted.

The complainant having closed his case, the defendant sought to prove by Henry Long, that Thomas C. Brown in his life time, to-wit: in the early part of 1841, had paid to the administrators of James Fannin, the sum of \$2800, or thereabouts, in extinguishment of a debt due said estate by Smith, the complainant.

The Court ruled the testimony inadmissible, on the ground that it showed a payment, and that no payment had been pleaded by the defendant.

Counsel for defendant excepted.

The testimony of Kinchen L. Harrison, going to the same point, was ruled out by the Court, and counsel for defendant excepted.

Counsel for defendant requested the Court to charge the Jury, "that the Statute of Limitations commenced to run from the date of the receipt." Which charge, the Court refused to make, but charged that the receipt, *per se*, showed that something was to be done with the funds by Brown, executory in its character, for which he was accountable on demand, and therefore, that the Statute only run from the time of a demand for an account.

To which, counsel for defendant excepted, and upon these several exceptions, have assigned error.

JOHN L. STEPHENS & WELLBORN, for plaintiff in error.

HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Otis Smith filed a bill in Coweta Superior Court, against John C. Simms, as administrator of Thomas C. Brown, deceased, charging that in January, 1840, he placed in the hands of said deceased, solvent notes, amounting to some six thousand dollars, which Brown received, in especial trust and confidence, and was to collect and employ the proceeds, as his agent, and for his use and benefit, in whatever way Brown might deem best and most conducive to complainant's interest; that he received said fund, promising to account for the principal and profits made thereon, whenever requested; that Brown immediately collected the whole amount of money due upon said notes, and placed the same into active and profitable operation, by shaving notes at heavy discount; and that by this and like means, the profits on said fund, amounted in 1847, to fifteen thousand dollars.

The bill further alleged, that in 1847, complainant demanded an account and settlement, which the defendant died without making; that Simms was appointed his administrator; the prayer was for an account. The receipt given by Brown to Smith, and

which was appended to the bill, as an exhibit, was as follows: "Received, January 20th, 1840, of Otis Smith, the following notes, to be disposed of in such manner as my judgment may dictate, for which I am to return an account to said Smith when called for, &c." A schedule of the notes is subjoined.

To this bill an answer was filed, in which Simms, in behalf of his intestate, insisted that Brown had accounted with Smith in his life time, for the principal and lawful interest collected upon these notes, which he contended, was all he was bound to pay; and that in January, 1843, the parties had a full and final settlement, when Smith fell in Brown's debt, some six hundred dollars, for which he gave his note of hand. The answer also sets up as a defence, the Statute of Limitations.

[1.] Two witnesses, William H. Hooper and William Dougherty, were offered on the part of the complainant, who testified that Brown admitted, in sundry conversations with them, that he had Smith's effects in his hands; and that he had induced Smith to convert his negroes into money, and to deposit the proceeds with him, to be employed for Smith's benefit, as Smith was thriftless in the management of property. Brown promised that he could, and would make the fund, pay Smith a good interest. They further proved, that some five or six thousand dollars was realized on Smith's notes very soon after they came into Brown's possession.

The introduction of this evidence was objected to, on the grounds: 1st. That it was irrelevant; and 2dly. That it altered and enlarged the written contract between the parties, that is, the receipt appended to the bill. The objection was overruled by the Court, and we think properly. Holding as we do, that the receipt itself constituted a *trust*, and that it needed no *aliunde* proof, to elucidate the true intent and meaning, the testimony served to establish, several important facts. It showed, among other things, that the fund came immediately into the hands of Brown, and that by his own admissions he was actively and advantageously investing it, for the use of Smith. The *dates*, too, when he made these acknowledgments, are very material, setting up as his representative does, a final settlement between the intes-

tate and Smith, in January, 1843, in bar of any other or further account.

It seems that complainant Smith was owing the estate of one James Fannin, deceased, a large debt, amounting, the first of January, 1842, to \$2877 14. The defendant proposed to prove by Henry Long and Kinchen L. Haralson, that he had discharged the debt, and that it was done by the authority, and under the express instructions of Smith. But the Court rejected the testimony, upon the ground that no foundation was laid for its introduction by the defendant in his answer; that he had neither pleaded payment generally, nor set forth the facts of this transaction, so as to entitle him to the benefit of the proof. And we are not prepared to say, but that in strictness the Court was right. This bill is filed, however, for an account; and the defendant who is not presumed to be cognizant of all the pecuniary transactions of his intestate, states generally, that he is advised, and believes, that Brown did in his lifetime account to the complainant for the full amount, which he collected for him; and that on the 17th day of January, 1843, he came to a full and fair settlement of all money matters between Smith and himself; that the complainant was found to owe his intestate a balance of \$666 72, for which he gave his note, due one day after date.

The equity of the case, is so strongly with the defendant, that rather than exclude this credit, and thus deprive his estate of the benefits of this disbursement, we should feel bound to send this case back, and order a new trial, for the purpose of letting in this proof.

Without stopping to consider the charge of the Court, under each particular specification into which it has been subdivided in the assignment of errors, I propose to restrict my examination to one other question only, viz: whether the complainant's right to call the administrator of the defendant to account with him, concerning the notes placed in his intestate's hands, and entrusted to his discretionary management for Smith's benefit, is not barred by the Statute of Limitations.

[2.] And I take this occasion, to repeat an intimation thrown

out by the Court, more than once during the present term; and that is, that where a point has been distinctly made by the pleadings and solemnly adjudicated by this Court, it would not only save time, to us all so precious, but a useless expenditure of labor, both on the part of counsel and the Court, if counsel would rest the case upon the decision. It is not unusual to consume hours in reading authorities which have been reviewed and referred to by this Court, in parallel cases, and then to conclude, perhaps, by remarking that the principle which they establish, was ruled or recognized by this Court, in a certain case, which is cited perhaps on the brief, but not always read on the argument.

Now, if it be desirable to show a distinction between the original reports, and the decided case, in some particulars, or to carry the doctrine which they establish, further than it has hitherto been adopted, it is altogether right and proper to refer to them, provided, the point under consideration turns upon the discrepancy; otherwise we respectfully submit that our own decisions are paramount authority, until reversed.

How often too, have we been compelled to listen to an eloquent appeal from the bar, to induce us to grant a new trial, on the ground that the verdict rendered in the Circuit Court, was contrary to evidence. Our books are crowded with opinions upon this point. And yet from the case of *Jones vs. The State*, in 1 *Kelly*, down to *Walker vs. Walker*, just argued, this Court has never exhibited the slightest variableness upon this question. Its uniform position has been, both in *civil* and *criminal* cases, that if there was *any* evidence to support the verdict of the Jury, it would not be disturbed. If this doctrine is not firmly settled in this Court, nothing is or can be. And so of many other principles, which need not be enumerated. This will suffice for an illustration; and with these preliminary observations, I pass on to the exception under discussion.

[3.] As it respects the plea of the Statute of Limitations, we think this case identical in every feature and fact with *Keaton & Greenwood*, 8 *Geo. Rep.* 97.

There, as here, the complainant in the bill, had deposited in

the hands of the defendant, a large amount of money and property, to be used, managed and invested, for her benefit, in the *trust and confidence* that it would be so used, managed and invested, as would be most conducive to the complainant's interest; and that the defendant would account for the same, and the profits arising therefrom, whenever requested so to do. The bill there, as here, charged that the defendant accepted the trust, by receiving the money and property, for the purposes designated, and had made large profits from the same. In both cases, it appears that the trust continued as a *subsisting trust* in defendant—in *Keaton & Greenwood*, from 1835 to 1849, and in the case before us, from 1840 to 1847. In the former case fourteen years had intervened, before an account and settlement were demanded in; the present case, seven years only—just half that time. In the former case, we held that the Statute did not begin to run in favor of *Keaton*, the defendant, until 1849, when the agent of Mrs. Greenwood, the complainant, called on him for an account, which he refused to render, denying that he had any effects of her's in his hands. To be consistent, we cannot then, do otherwise than hold, that from the allegations in the bill and the testimony in the case before us, the starting point for the operation of the Statute, was in 1847, when Brown was called on by Smith, for an account, and a settlement was demanded. It does not appear, even at that time, that the trust was disavowed, or any adverse claim set up to the funds in his hands.

Our judgment therefore is, that this being a case of express trust, created by the act of the parties, that the Statute did not begin to run in favor of Brown, so long as the trust continued and was acknowledged by Brown; for until he repudiated the trust, his possession was, in contemplation of law, the possession of his *cestui que trust*.

Mr. Wellborn argues, that according to the rule in *Kane vs. Bloodgood*, (7 Johns. Ch. Rep. 123,) and which has received the sanction of this Court, that Smith having an ample remedy at Law, for the recovery of his effects, i. e. trover or *detinue*, or *assumpsit* for money had and received, that he could not evade-

the Statute by electing to sue in Chancery; and that all that Chancery could, or would do, would be to hear a reasonable excuse, for having omitted to sue at Law; and that to go beyond this, would be to place the rights of defence, in certain cases, in the hands of plaintiffs, and to permit them at will to use the Courts of Chancery, as the means of arresting them from defendants.

Conceding all this to be true, does it apply to the case made by this record? This bill is not filed to recover back the fund *merely*, placed in the hands of Brown by Smith, but to compel his estate to answer for the due performance of the trust, which he voluntarily assumed in his life time, for the benefit of the complainant. And in England no action at Law would lie for this purpose. Had the trust been terminated by Brown's converting the effects to his own use, or denying that he held them, and notifying Smith of the fact, trover, or detinue, or *assumpsit*, might have been brought as suggested; and under that state of facts, these Common Law actions would have afforded an ample and adequate remedy, and the Statute of Limitations would have run against a proceeding in Chancery, from that time.

But neither party desired to discontinue the trust; on the contrary, it was permitted to run on, until the year Brown died. And now an appeal is made to Chancery, not to recover the assets, but to coerce an account of the trust, in accordance with the contract, which I repeat, no Common Law suit will reach; resort can only be had to Equity, where matters of this sort are alone cognizable and relievable.

It is possible that under the 53d section of the Judiciary Act of 1799, conferring Equity powers upon our Superior Courts, and the amendatory Statute of 1820, which allows parties, in *all cases*, to institute their action upon the Common Law side of the Court, where they *conceive* that they can establish their claim without resorting to the conscience of the defendant, that a suit at Law might be brought in this State, to enforce even the execution of a trust. Such an attempt however, would obviously be attended with such stubborn, if not insurmountable difficulties, that few attorneys would have the courage—I had almost

said the hardihood—to make the experiment. It is due to counsel to state, that they do not take this position.

I submit, moreover, that if it be true, that where a party has a *legal* remedy, he cannot escape the Statute by retreating into Equity: so on the other hand, under the Acts I have quoted, where he *conceives* that he has none—and in this class of cases, the discretion is lodged with the party himself—and when by the Common Law, he has no other recourse but in Chancery, it would be oppressive in the extreme, to take away his right; and for myself I must insist and hold, that in cases like the present, the principle of legal remedies, has no application. The trust was executory and subsisting; and until put an end to by the separate act of one of the parties, or the joint act of both, there was no starting point for the operation of the Statute; it never could begin to run, so long as the trust was acknowledged, as a continuing, subsisting trust.

[4.] In view of the whole case, we shall grant a re-hearing unless the complainant will write off, from the amount of his recovery, the sum paid by Brown, for Smith, to Fannin's estate, to wit, the sum of \$2877 14, with interest thereon, from the first of January, 1842, and so adjudge accordingly.

No. 30.—B. WALKER, caveator, &c. plaintiff in error, vs. N. F. WALKER, propounder, &c. defendant.

[1.] Where there has been evidence in a cause submitted to the Jury on both sides, which is very conflicting, and no rule of law violated in its admission, it is error in the Court, to grant a new trial, on the ground that the verdict is contrary to evidence. The Jury in such cases, are the exclusive judges, as to the weight of the evidence, and the credibility of the witnesses.

[2.] When a Juror has been impannelled to try a cause, and during the trial, and before he has rendered his verdict, he shall be entertained by either of

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the parties, at *their expense*, and the verdict is found in favor of the party so entertaining the Juror, the verdict will be set aside.

Motion for new trial, in Upson Superior Court. Decided by Judge STARKE, April Term, 1851.

At the July Term, 1850, of the Inferior Court of Upson County, sitting as a Court of Ordinary, the will of Charity Walker was propounded for record, by her executor, Nathaniel F. Walker. Benjamin Walker, an heir at law, of the said Charity, filed a caveat to the will. The Court admitted the will to record, and the caveator entered an appeal.

At the April Term, 1851, of Upson Superior Court, the cause came on to be tried on the appeal.

Much testimony was introduced by both parties, in relation to the capacity of the testatrix to make a will.

Obediah C. Gibson *sworn*. "He was a subscribing witness; testatrix was a very old woman, and quite feeble; thought she was of sound and disposing mind, at the time of the execution of the will."

Dr. Knox, a subscribing witness, testified, "that testatrix was of sound and disposing mind and memory," &c.

Dr. Cheney, examined on the part of the caveator, testified that he had known testatrix since 1843; that he was the only physician she had for five years; when she died, he thought she was in her dotage."

Jacob King testified, "that he did not think testatrix capable of anything."

A great number of witnesses was introduced, both by the propounder and caveator, and the evidence was conflicting.

The Jury found a verdict against the will.

Whereupon counsel for propounder, moved for a new trial, upon the following, among other grounds:

1st. Because after the Jury were impanelled to try the cause, and after the testimony had been submitted, and a portion of the argument of counsel had been made, during the recess of the Court from one day until the next, Nathan Respass, one of the

Jurors, went home with the caveator, at his invitation, and was by said caveator entertained by him at his expense. 2nd. Because the verdict was contrary to the evidence.

At the hearing of the motion for a new trial, counsel for caveator, admitted that Respass the Juror, spent the night at the house of caveator, as stated in the first ground for a new trial.

The Court permitted Respass, the Juror, to file his affidavit in substance: that he had been on terms of intimacy and friendship with caveator, for more than 20 years; that he had no conversation with him in relation to the trial, nor did the circumstance of his spending the night at the house of caveator, influence him in giving his consent to the verdict, &c.

The Court granted a new trial, on both the grounds taken in the *rule nisi*, and counsel for caveator excepted.

J. FLOYD and GOODE, for plaintiff in error.

GREENE and HARMAN, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

In this case, there was a motion for a new trial in the Court below, on two grounds: First. Because the verdict was contrary to the evidence. Second. Because one of the Jurors, impannelled to try the cause, while the same was pending, and after the testimony had been submitted, and a portion of the argument of counsel had been made, during the recess of the Court from one day until the next, went home with the caveator, remained all night at his house, and was entertained by him, at his, the caveator's, expense, in whose favor the verdict was found by the Jury.

[1.] The Court below granted a new trial on *both* the grounds taken in the rule. In relation to the first ground, that the verdict was contrary to the evidence, the Court, in our judgment, was clearly in error. There was much evidence on both sides, in regard to the *capacity* of the testatrix to make a will, and this evidence was very conflicting. The capacity of the tes-

tatrix to make a will, and the credibility of the witnesses, were *exclusively* questions for the consideration of the Jury. There is no complaint, that any rule of law was violated by the Court, in submitting the facts to the Jury for their consideration. This question has been repeatedly adjudicated by this Court. *Craft vs. Jackson*, 4 Geo. Rep. 360. *Armistead vs. Barker*, *Ibid*, 170. *Peck vs. Land*, 2 Kelly, 16. *Stroud vs. Mays*, 7 Geo. Rep. 269. *Flournoy vs. Newton*, 8 Geo. Rep. 306.

[2.] In our judgment, the new trial was properly granted by the Court below, on the ground that the Juror was entertained at the expense of the caveator, as stated in the record.

It is true, the affidavit of the Juror was produced, in which he states that his verdict was not influenced by the kindness and hospitality of the caveator. But we place our judgment on the principle of the Common Law, which we consider a safe and salutary rule. When a Juror has been impannelled to try a cause, and during the trial, and before he has rendered his verdict, he shall be *entertained*, by either of the parties, at *their expense*, and the verdict be in favor of the party so entertaining the Juror, the verdict will be set aside. *Graham on New Trials*, 96, 97, 98, and cases there cited. This rule is indispensably necessary to preserve the purity and integrity of Jury trials in our Courts, and cannot be too strictly enforced.

Let the judgment of the Court below, granting a new trial, upon the last ground considered and adjudged by this Court, be affirmed.

**No. 31.—RICHARD BASSETT and others, plaintiffs in error, vs.
THE GOVERNOR, use, &c. &c. defendants in error.**

- [1.] It is the duty of the Collector of Taxes to apply for a commission within twenty days after his election, but there is no law requiring the Governor to issue it immediately; and if the Collector does apply for his commission within time, and gives bond within ten days after he is notified that his commission has arrived, such bond is a valid statutory bond: *Held*, also, that the commission must issue soon enough to allow the Collector ten days, before the first day of July, within which to qualify.
- [2.] It is not compulsory on the Justices of the Inferior Court, to take bond and security of the Tax Collector, under the Act of 1821, for the collection and payment of the *County Taxes*, but discretionary. When required, it is the duty of the Collector to give it, and upon failure to collect and pay over the County taxes, the Justices of the Inferior Court may issue execution for the same against him and his sureties on such bond; and whether such bond be taken or not, the sureties on his general bond are liable to make good his default in the collection and payment of the *County taxes*; and the Justices of the Inferior Court may issue execution against them for the same, in the name of the Governor, for their use.
- [3.] Such execution may issue at any time, and is properly returnable before the Justices of the Inferior Court, they being authorized to act in this regard as individuals, and not as a Court.
- [4.] The execution issues in such cases for the balance of the amount of the taxes assessed for County purposes, and not paid over on the first Monday in December: and it is not necessary that the execution be based on any order or judgment of the Justices; yet, it is expedient that there be such an order passed.
- [5.] When the Inferior Court had authorized the Collector to receive County orders in payment of County taxes, and execution has issued against him for taxes unpaid, he is entitled to be credited thereon, for such orders only as he may have turned over to the Court, or tendered to them, or which he brings into Court and there tenders.
- [6.] Citizens of a County, held to be competent as Jurors to try an issue made on an execution issued against the Tax Collector and his sureties for the County Taxes, not collected and paid over according to law.

Illegality, in Bibb Superior Court. Tried before Judge STARK, July Term, 1851.

On the first day of January, 1849, Richard Bassett was elected Tax Collector in and for the County of Bibb, for that year.

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On the fifth day of June following, he executed, in the presence of three of the Justices of the Inferior Court, his bond, as such Collector.

At the January Term, 1850, of said Court, the Justices thereof passed an order authorizing a *fi. fa.* to issue against Bassett and his securities, for the sum of \$5024 57 cents, as so much County Tax collected by him, for the year 1849.

On the 28th day of January, a *fi. fa.* was issued accordingly, by the Clerk of said Court, returnable to the March Term following.

To the *fi. fa.* Bassett and his securities filed an affidavit of illegality, upon the following, among other grounds :

1. That said bond was not executed and accepted at the time, and within the time, and in accordance with the provisions, and in the manners specified and required by law, in cases of Tax Collector's bond.

2. That the office of Tax Collector of the County of Bibb was vacant, under the provisions of the Statute in regard to such cases made and provided, at the time said bond purports to have been made and executed.

3. That the bond on which this *fi. fa.* was issued, not being good, as claimed in the preceding grounds, as a statutory bond, nor in fact, good and binding upon the defendants at all, or if at all, only as a voluntary bond, the Inferior Court had not the power summarily to issue a *fi. fa.* on such bond, against Bassett and his securities ; and that the order passed by the said Court, authorizing the *fi. fa.* to issue, was unconstitutional and void, because no notice was given to Bassett and his securities, and they were deprived of a trial by Jury.

4. That the whole amount claimed in said *fi. fa.* was the extraordinary or County tax ; and that the bond given by Bassett was executed to the Governor of the State, for the collection of the State Tax, and the performance of his duties as Tax Collector ; and that no bond was ever given by Bassett for the collection of the extraordinary or County tax.

5. That the *fi. fa.* should have issued in the name of the

Justices of the Inferior Court, for the use of the County of Bibb, and not in the name of the Governor, &c.

7. That a part of the amount of said *fi. fa.* is for taxes never collected by Bassett, as is required by law, before issuing such an execution.

Counsel for the plaintiffs traversed the grounds taken on the affidavit of illegality, and the cause was transferred to the Appeal Docket in the Superior Court of Bibb County, by consent.

The cause came on to be tried on the appeal, at July Term, 1851, of Bibb Superior Court, when counsel for the defendants objected to the array of Jurors, on the ground that, being citizens of Bibb County, they were interested in the issue. The Court overruled the objection, and defendant, by his counsel, excepted. Counsel for defendant objected to the issue being tried, for want of jurisdiction in the Inferior Court, the *fi. fa.* having been made returnable to that Court, when it should have been made returnable to the Superior Court; and also, because the *fi. fa.* was founded on an order, purporting to have been passed at the January Term, 1850, of said Inferior Court, when, in fact, there was no such term of said Court.

The Court overruled the objections, and defendant's counsel excepted.

The fourth and fifth grounds taken in the affidavit of illegality, being legal questions, were, after argument, overruled by the Court, and counsel for defendants excepted.

When the *fi. fa.* was tendered in evidence, counsel for defendants objected, on the ground that it did not follow the judgment, and the objection was overruled by the Court, and defendants excepted.

In the progress of the trial, the defendants proved that a portion of the taxes for which the *fi. fa.* was issued, had not been collected and was not in the hands of Bassett at the time of issuing the execution, and thereupon they moved to quash the *fi. fa.* The motion was overruled by the Court, and counsel for defendants excepted.

After the testimony was closed, counsel for defendants moved

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the Court to withdraw the cause from the Jury, because the Jury was not the one stricken.

The Court overruled the motion, and counsel for defendants excepted.

The Court charged the Jury, that if Bassett had collected the County taxes in money, or had "orders" of the kind the Inferior Court had agreed to receive, enough to pay the balance due for County taxes, in either case he was entitled to no credit on the *fi. fa.* except for such an amount of County orders as he had actually paid over or tendered.

The Court also charged the Jury, that the bond of Bassett and his securities was a good and statutory bond.

To which rulings of the Court, counsel for defendants excepted.

And upon these several exceptions have assigned error.

RUTHERFORD, HINES and HALL, for plaintiffs in error.

STUBBS & LESTER and WHITTLE, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The bond of the *Collector* is a good statutory bond. The Act of 13th December, 1809, does not embrace *Collectors*. Whether intentionally or inadvertently, they are omitted. It applies only to *Clerks of the Superior, Inferior and Courts of Ordinary, Sheriffs, Coroners and County Surveyors*, and requires them to make application to the Governor for their commissions within *twenty days* after their election. *Cobb's N. Dig.* 200. By the Act of 1811, *Collectors* and other County officers, are required to take their oaths of office and give bond within *ten days after they are notified of the arrival of their commissions*. *Cobb's N. D.* 202. And by the Act of 1823, *Collectors* and other officers are required to apply for and obtain their commissions and certificates, and qualify within the time and manner theretofore pointed out by law; and if they do not, their offices are to be considered vacant, and they are declared to be

ineligible. *Cobb's N. D.* 209. I do not doubt but that the Act of 1823, by a fair construction, may be considered as extending the provisions of the Act of 1809 to *Collectors*, and therefore, it is the duty of the *Tax Collector* to apply to the Governor for his commission within *twenty days* from his election; and when the commission is sent forward to the *Inferior Court*, to qualify within *ten days* from the time of his receiving notice of its arrival. And if it is *not* applied for within the time, or if it is, and it is sent out by the Governor, and he is duly notified of its arrival and he does *not* qualify within the ten days, his office will be declared vacant and he be ineligible, unless his failure to do so was occasioned by the act of others, over which he could have no control. The position taken against this bond is, that it was not taken within thirty days from the election of the officer, giving him twenty days to apply for his commission, and ten days to qualify after it issues. A bond executed after thirty days, it is said, is not taken according to the Statute, and therefore the office is vacant and the bond void; and inasmuch as this officer was elected in *January* and this bond bears date in *June*, it is void as a Statutory bond. Without yielding our assent to the conclusions, in their full extent, to which the counsel come, or stating wherein they are properly subject to modification, the necessities of this case require us to say only, that it does not appear from this record, but that the application for the commission was made within twenty days, and the officer gave his bond within ten days after it was sent forward, and he had notice of its arrival. Certain things the law requires the Collector to do: he must apply to the Governor for his commission within twenty days, and when the commission issues and he has notice, he must qualify within ten days. These are burdens put upon him; and he must do these things at his peril. As to the first—applying for his commission—it does not appear to us that he failed to apply. We must presume that he did apply. As to the second, the obligation to qualify *does not arise until the commission issues*. We know of no law which requires the Governor to issue the commission as a matter of course, as soon as application is made for it. Although it is to be

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considered, that in accordance with the policy of these Statutes, looking to the prompt qualification of County officers, and through that to the efficiency of the public service, he will issue the commission so soon as applied for; yet, there is no law which requires him to do so. He is required, by the Act of 1810, to commission Collectors and Receivers, but no time is specified within which it shall be done. *Cobb's N. Dig.* 200. If there is no reason operating upon the mind of the Governor for deferring it, he will commission them—that is, he will send out the commission, with a *dedimus* to the *Justices* of the *Inferior Court*, who will deliver it, upon the officer's giving bond. And no doubt, the intent of the law is, that he will do so without delay, generally. But if there are reasons which the Governor esteems of sufficient weight for postponing it, he is not prohibited by law, from doing so; provided, always, that when issued at all, he must issue it so early as to give the Collector the allotted time to qualify, before the first of July; at which time the law requires him to proceed with the collection of the taxes. *Cobb's N. D.* 1073. Such is the usage of the Executive office, grown up under able men, upon a fair consideration of the Statutes. The Act of 1804 requires the Governor to take bond of the Collectors, and transmit to the Inferior Court a *dedimus* for its execution. The *dedimus* is usually accompanied with a commission; but this Act fixes no time within which it shall be done. By the 5th section of the same Act, the Collectors and Receivers are made responsible to the *Executive* Department, and are amenable to such rules, in conducting the duties of their offices, as the Governor may think necessary and proper. *Cobb's N. D.* 1046. Wherein it would seem, that discretion, of course limited by the positive provisions of law, is given to the Governor, as to the general supervision of, and control over these officers. We have had occasion to say in other cases, and we shall say in this case, that the collection of the taxes is left by our laws, to be enforced mainly by the *Executive*. For these reasons we affirm the judgment of the Court below, deciding that this is a good statutory bond. If good as a statutory bond, the question made as to the right of

trial by Jury, upon the assumption that this proceeding was on a voluntary bond, need not be considered.

[2.] The next ground of error which I notice, is the ruling of the Court, that the sureties of the Collector are liable upon this bond for a failure to pay over the *County taxes*. It was made payable to the Governor, and is the general bond given by the officer for the faithful performance of his duties as *Tax Collector*. The counsel for the plaintiffs in error, hold that it is intended to secure the payment of the State tax alone, and that the sureties are not bound to make good a defalcation of their principal, therefore, in failing to pay over the taxes raised for County purposes. They insist that by law, the *Justices of the Inferior Court* are required to demand, and the Collector is required to give, a separate bond, to secure the faithful execution of his duties, so far as the collection and settlement of the County taxes are concerned; and inasmuch as this is so, the bond to the Governor is only to secure the faithful performance of his duties, so far as the collection and settlement of the *State taxes* are concerned. A necessary deduction from these propositions is, that the sureties on the bond to the Governor, are not liable for a failure to pay over the County taxes. To settle this question, it is not necessary to go behind the Act of 1804, which was of force when this proceeding was instituted. By the 5th section of that Act, *Collectors* are required to enter into bond, with *sufficient securities*, before they enter on the duties of their office. By the 6th sect. the *Governor* is required to take bond of the *Collectors*, with security, "for the due performance of all the duties required of them." *The Justices of the Inferior Court*, in the same section, are charged with the duty of receiving and causing the bond to be executed, and of seeing to it, that the security is sufficient. They are "to approve" the sureties. *Cobb's N. D.* 1046. This bond is "for the due performance of all the duties required" of the Collector—required by law. Not one, or a part of these duties, but all. It is his *official* bond, intended to insure fidelity in the execution of his trust, and thus to protect the public from loss. The law makes no specification of his duties; nor does it limit the extent of the obligation

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assumed by the sureties. They undertake for him, that he will duly perform all the duties which the law devolves upon him; and if he makes default in any, they agree, by signing his bond, to make it good. It is into such a league, and no less, that they come. This is clear from the law under which the bond is taken. Their obligation is co-extensive with the objects and ends contemplated by law, in requiring bond and security. It is furthermore manifest, from the very terms of their contract. In this very bond they agreed, that if their principal, *Richard Bassett*, Tax Collector of the County of *Bibb*, for the year 1849, shall not well and truly do and perform all and singular the duties required of him, in virtue of his office, as Tax Collector, according to law and the trust reposed in him, then they will be bound to the Governor in the sum of \$18,000, to make good his default. It is not for them, therefore, to demur to any liability, which grows out of a failure on his part, faithfully to do and perform any duty required of him by law, in virtue of his office. And what are the duties required of him? To collect and pay over, by a specified time, the State taxes. Nor is this the whole of his duty. He is required expressly, by the *Act of 1821*, to collect the extraordinary taxes levied by the *Justices of the Inferior Court* for County purposes; and the same Act provides a compensation for this service. *Cobb's N. D.* 184. One of the duties then, devolved upon him by law, in virtue of his office, is to collect and pay over the County tax; to do which, faithfully, his sureties have guarantied. They signed his bond with knowledge of the fact, that it was a part of his official duty to collect and pay over the County taxes; for they are presumed to know and to contract in reference to the public laws of the State.

This is not all. By the Act of 1810, the Justices of the Inferior Court are authorized to issue, in their own names, for the use of the County, execution against any Tax Collector and his sureties, who may be in default for the County taxes. *Cobb's N. D.* 1056. When in default for the State taxes, execution is issued by the Comptroller. Here is a remedy provided for the Counties. The Act of 1810 was re-enacted in 1815. *Cobb's N. D.* 1062. And with greater clearness and

stringency by the Act of 1825. *Cobb's N. D.* 1066. It is not to be questioned therefore, that the sureties are liable on this bond, unless their liability is relieved by the Act of 1821, which authorizes the taking of a separate bond for the County tax. We are clear that it is not. The Act is in the following words: "It shall be the duty of the *Tax Collector* of any County in which an extraordinary tax may be levied in the manner provided in the foregoing sections of this Act, upon being required to do so by the *Justices of the Inferior Court*, or a majority of them, to give bond and approved security to the *Justices* aforesaid, or their successors in office, in a sum not exceeding double the amount of the extraordinary tax assessed, conditioned for the faithful collection and payment of the same into the Clerk's office of the *Inferior Court*; there to remain subject to the order and application of the *Justices of the Inferior Court*, for County purposes, &c." *Cobb's N. D.* 184. The bond authorized by this Act is accumulated security for the collection and payment of County taxes. It does not supersede the liability of the sureties on the general official bond, but provides a security in addition thereto. They are liable, with or without any second bond, upon this undertaking, that the Collector shall perform all the duties of his office, one of which, we have seen, is the collection of the County tax. It is made the duty of the Collector to give this additional bond, when required so to do, by the *Justices of the Inferior Court*. They are not required by the law to demand it. It is within their discretion to require it or not. This is obviously the intention of the Act. It does not make it a qualification for entering on the duties of his office. The giving the other bond is a precedent condition to performing the duties and receiving the emoluments of the office. And if he presumes to collect taxes without giving it, he is subject to a heavy forfeiture, and a severe penal infliction. This bond he is bound to give, only "upon being required so to do, by the *Justices of the Inferior Court*, or a majority of them." They demand it, if in their judgment the interest of the County requires it, and not otherwise. This discretion is left with them for good reasons. The amount of

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the County tax is not ascertained when the general official bond is given. It may be more or less. The first bond may or may not be amply sufficient. The sureties, or some of them, may be solvent when it is given, and become insolvent, or may depart the realm and eloin their property. The taking of a second bond being a matter of discretion, if they do take it, I should hold the sureties still bound on the first, with the sureties on the second; and if, as in this case, they do not take it, we are well satisfied that the sureties on the first bond are liable.

[3.] At the January Term, 1850, the *Inferior Court* passed an order, reciting, that *Richard Bassett*, Tax Collector for the County of *Bibb*, had collected the sum of \$5024 57 cents, and had refused to pay over the same to the proper authorities entitled to receive it; that the same was levied for County purposes, and as such collected, and was now in his hands, and had been duly demanded of him; and directing that execution issue against him and his sureties, (naming them) in terms of the Statute, for the aforesaid sum of money, with interest at the rate of 25 per cent. and that the order be entered upon the minutes of the Court. Upon this order, execution issued against *Bassett* and his sureties, for the sum of \$5024 57 cents, with 25 per cent. interest and cost, in the name of *George W. Towns, Governor and Commander in Chief of the Army and Navy of this State, for the use of the Inferior Court for the County of Bibb*. In the progress of the trial, divers exceptions were made upon this order and the execution issued upon it. It is insisted by counsel for the plaintiffs in error, that this order and execution are void, because,

1st. The order was granted at *January Term of the Inferior Court*; and there is by law, no such term for the *Inferior Court* of *Bibb County*.

2d. Because the order was taken and the execution issued for a larger sum than, as turned out in evidence, the Collector had collected and held in his hands at the time. And as part and parcel of this position, they say, if they are void in part, they are void as to the whole.

3d. Because the *execution* ought to have issued in the name of the *Justices of the Inferior Court*, for the use of the County of *Bibb*, instead of *Geo. W. Towns, Governor, &c. &c.* for the use of the *Inferior Court of Bibb County*.

4th. Because the *execution* was made returnable before the *Inferior Court*, when it ought to have been returned to the *Superior Court*, the *Inferior Court* having no jurisdiction of the cause.

5th. Because the *execution* does not follow the judgment or order upon which it is founded.

All these grounds were assumed before the Court below, either in the *illegality*, or as exceptions to the admissibility of the *execution* in evidence, and were overruled. It is not material how the questions are made—they are here for consideration.

The principles upon which public agents act, where they are authorized to issue process for the collection of public money, when stated, afford a sufficient answer to several of those exceptions. The execution in this case was issued by virtue of the Act of 1825. The first section is as follows: "In all cases where there may be any tax due to the *County*, in the hands of the *Collector* of any *County*, and collected by the Tax Collector of any *County*, and not paid over to the proper authority on or before the first Monday in December next, after the same may be collected in any year, the *Justices of the Inferior Court*, or a majority of them, in each *County* be, and they are hereby authorized, immediately to issue execution against any Tax Collector and his securities, so neglecting or refusing to pay over such tax." The 2d section makes him liable for 25 per cent. interest. *Cobb's N. D.* 1066.

[4.] The power conferred upon the *Justices* by this Act, is not conferred upon them as a Court, but as individuals. They are the agents of the State, made so by this Act, for the purpose of collecting the public funds in the hands of the Collector. Whilst they are for the purposes of each *County* more immediately, yet the whole State is interested in them. Each of the *Counties* have as much interest in the *County* taxes, of all the rest, as each *County* has in the social, educational and

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monetary prosperity of all the rest. County taxes are raised by legislative authority. They can be raised no other way. They are a part of the public revenue of the State. To collect them when in arrear, the *Legislature* has clothed the Justices of each County, or a majority of them, with the power of issuing a process. It is called *an execution*. It is in the nature of a distress. It issues without a trial, and without a judgment. *The State* moves by its agents, directly upon the Collector and his sureties, and seizes and sells their property by a process which it calls an execution, and which is an execution. It is the process by which the Collector is forced, and his sureties who are his vouchers, are forced to perform a duty, which he and they owe to the State, and that is to pay up the public funds in arrear. It is the same kind of power with that with which the Comptroller is clothed, and with that with which the Collector himself is clothed. See *Doe ex dem. Gladney vs. Deavors*, lately decided at Columbus, ante, page 81. Upon this view of the duties and powers of the Justices in this regard, it is quite immaterial whether the order was passed in *term time* or in vacation. It was an act of the *individuals* and not of the Court. So also, upon this view, the execution is properly returnable before themselves; and the two objections, that the order was issued at an impossible term and returnable before them at the subsequent March Term, fall to the ground.

The law makes it the duty of the Collector to pay in the County taxes on or before the first Monday in December. If he fails to do it, he and his sureties are immediately liable to process of execution. The execution is to be issued by the Justices. They are to determine what amount is not paid. Clearly there is but one way for them to ascertain that fact, and that is, to give him credit for what is paid of the County assessment, and issue execution for the balance. It is an unfair construction of the Act of 1825, to say that it intends that execution shall issue only for the sum that he has in fact collected and holds in his hand. If this be the true construction, then, the Collector is perfectly safe, if he folds his hands and declines to collect a single dollar, or having collected the

taxes, puts them out of his hands in the purchase of property or in any other way. It must be admitted that the Act is framed with singular inaptness of phraseology. It declares that in all cases where there may be any tax due to the County, in the hands of the *Collector*, and collected by him, and not paid over to the proper authorities, on or before the first Monday in December, execution shall issue. The *letter* bears the construction of plaintiff in error; but that construction makes the Statute suicidal. It is ambiguous, and therefore open to construction, and we must look to the subject matter and the objects in view, to get at the legislative intention. The subject matter is the County taxes, and the object is to provide means of collecting them out of the Collectors and their sureties. This object could not be effected, if execution could issue only for the taxes *collected and in hand*. To give any proper effect to the Act, we must infer that the Legislature meant to say, that the amount due to the County from the Collector should be the sum for which the execution should issue; and when not paid over by the first Monday in December, that it should be considered as collected and in hand. This is not an unreasonable presumption, when it is recollected with what promptly coercive powers the Legislature has clothed the Collectors. It would be curious indeed, if, to such a process as this, and in the face of this Act, and in the teeth of the policy of all our legislation upon these subjects, the Collector in arrear on the first Monday in December, could come in and say, I have not collected these taxes; or, I have collected them, but they were not in hand, for I have paid them for land and negroes. His duty is to collect and pay, by the first of December; and if he has not done so, it is the duty of the *Justices* to issue execution at once, for all the taxes on that day unpaid. So we hold that there is nothing in the exception that the execution issued for more than was proven to have been collected, and that if it be bad in part, it is bad as to the whole amount.

Nor do we perceive that there is any force in the objection that the execution does not follow the order. In point of fact it follows the order very closely. I cannot find wherein there

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is a variance. It is right that the Justices should keep a record of their proceedings. The order was necessary as a memorial of their action. But it is not a judgment. It was not necessary to pass such an order, as the basis upon which an execution might issue. It issues upon the balance due by the authority of the law. If so—and about that there is no doubt—if there was a variance, the variance would not be fatal to the execution. This objection goes upon the idea that the execution issues upon a judgment, as in cases of judgments rendered upon trials at Law or in Equity. If this order be a judgment then, all the exceptions which assail it, which I have been considering, ought not to have been considered; because *illegality* cannot go behind the judgment, but reaches only matters in discharge of the execution.

If this proceeding had been instituted against *Bassett* and his securities, on a bond given under the Act of 1821, the execution would then have issued in the name of the *Justices of the Inferior Court, for the use of the County of Bibb*, as counsel contend this execution ought to have been issued; because, that bond is taken, payable to the *Justices of the Inferior Court*. This execution is issued to charge *Bassett* and his securities on his general official bond, which is made payable to the *Governor*. It follows the bond, and was legally issued in the name of the *Governor*, for the use of the *Justices of the Inferior Court of the County of Bibb*. The Governor is the obligee of the bond, and the *Inferior Court*, as agents of the County and trustees of its funds, are the users.

[5.] We think that the Court was right in instructing the Jury that the plaintiffs in error were entitled to a verdict only for such orders as were paid over or tendered. The *Inferior Court* had authorized the Collector to receive County orders of a certain description in payment of County taxes; and they instructed their attorney to allow them in settlement with the Collector, for the balance due the County. Upon the trial he claimed a credit for certain of these orders, although not turned over to the Court, or tendered to them or their attorney in payment, or brought into Court and there tendered. These orders could not be al-

lowed in his favor, without being taken up by the Court—without subjecting them to the necessity of paying them twice. They are negotiable, and were presumed to have been transferred by the Collector and still outstanding. The Court did not err in holding him to produce them. Certainly it was a demand of extraordinary modesty to ask to be credited with orders which he had not returned to the Court, and which he did not offer to their acceptance out of Court, and which he could not produce in Court; simply because he had received them from the tax-payers. Just as well might he ask a credit for money received for taxes, which he had not paid over and which he does not bring into Court and plead as a tender.

[6.] The exception, that the Jury which tried the cause was not the Jury stricken, was waived in the argument. When the cause came on to be tried, counsel for the plaintiff in error objected to all and singular the array, upon the ground that they being citizens of *Bibb County*, were interested in the event of the issue, which being overruled, they excepted. This is a challenge to the polls, *propter effectum*. Counsel for the plaintiffs in error rely upon the case of *The Mayor, &c. of Columbus vs. Goetchius*, 7 *Geo. R.* 139. That case is distinguishable from this. It was *trover* for a slave, brought against the Mayor of Columbus; and certain members of the Jury who tried it, were held incompetent, because they were citizens of *Columbus* and interested in the event. We held them interested, because they were liable to be taxed to pay the verdict. The verdict in that case against the *Mayor, &c.* was virtually a verdict against the citizens whom that corporation represented; to pay which, the citizens were liable to be taxed. Here, the citizens of the County, if interested, have not in the event of this suit, so direct an interest. If the plaintiffs in execution in this case, fail to recover of the Collector and his sureties, it creates no charge upon the County—fixes no claim, to pay which, the citizens may be taxed. Such failure may or may not make it necessary for the County to assess and levy additional taxes. The fund, if received, goes into the County treasury, and each citizen of the County, and I may add, each citizen of the State is, in some

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sense, interested in its being paid over. But it is not so large an interest, or so direct and immediate an interest as the citizens of *Columbus* have, in the event of a suit brought against their corporation, and which they may be taxed to pay. But farther, it was competent in that case, to get a Jury from the County, not citizens of *Columbus*. So that excluding the citizens of *Columbus*, did not defeat altogether the plaintiff's remedy; but here, if the citizens of the County are excluded, the *plaintiffs in execution* have no remedy, and the administration of the law fails. There is nothing truer and nothing sounder, than that Jurors must be *omni exceptione majores*. Interest in the issue to be tried is a good and sufficient ground of challenge. No man can sit in judgment in his own case. Natural reason—natural justice, and all good social policy, forbid such a thing, and the Common Law will not permit it. No matter how slight the interest which a Juror may have in the issue, if he has any, the Common Law will not permit him to try it. The law will not trust the rights of parties to the passions of mankind. The Sheriff who impanels the Jury—the Jury and the witnesses, must be indifferent between the parties. Thus profound is the sense of the importance of impartiality, which our civilization entertains in the administration of the law. "The law, (says Lord *Mansfield*,) has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If, therefore, the Sheriff, a Juror, or a witness, be in *any sort interested* in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him." 3 *Burrow*, 1856, '7. 12 *Mod.* 669. *Hob.* 87. 1 *Salk.* 396. 2 *Johns. R.* 194. 1 *Bay*, 230. 8 *S. & R.* 441. 2 *Tyler*, 401. To exclude a jurymen, it is not necessary that he be entitled to a part of the recovery. His incapacity arises from a bias in the facts which he is to try; "and whatever be the facts which that bias touches, he is incapable of trying those facts." *Burrow*, 1857. We are not disposed to relax this Common Law rule, except in cases situated as this is. I am rather inclined to the opinion,

that upon the Common Law principles stated, the exception was well taken in this case. According to those principles, I do not see but that the Jury ought to be held as having, in the facts to be tried, a disqualifying interest. The main fact is the indebtedness of the Collector to the County. If found for the plaintiffs in execution, the fund is in hand for the purposes of the County—the repairing and building of bridges, the maintenance of the poor, education, &c.—and ready to be applied in discharge of engagements which, it is fair to presume, the County has already made, upon the faith of the assessment. In that event, it is also fair to presume that no other or farther assessment will be necessary to meet those engagements. But if found for the defendants, it is to be presumed that further assessment may become necessary to meet those engagements. Under such circumstances, is it right to trust the passions of the taxpayers to try the issue? The Supreme Court of New York excludes Jurors, under very similar circumstances. In a *Quitam* action to recover usurious interest, one moiety of which, by Statute, goes to the use of the poor of the town where it was received, that Court would not permit inhabitants of the town to try the action. 2 *Johns. R.* 194. It must be obvious, however, that the interest of the Jury in the case in hand, is slight, remote and uncertain; and that the presumptions of a bias growing out of it, extremely weak. It is scarcely greater than that which any citizen has in good and effective government, or in the general administration of justice. It is no greater than that which Jurors have in the trial of criminal offences, any portion of the penalty for which, goes to the County. In such cases, I have not known in this State, the competency of the Jury to be questioned. Such being our view of the character of the interest of the Jury in this case, I proceed to state the grounds upon which just such a case as this is, is not, in Georgia, within the operation of the Common Law rule. I remark first, that this is a *tax collection case*. To secure the payment of the public revenue, more than the ordinary powers, as we have in this opinion before shown, are conferred upon the agents of the Government; and the citizen has been brought under some severe limitations of

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great and fundamental principles. For example, execution issues against tax payers and Tax Collectors without a hearing, and without a judgment. When a tax payer is in default for the State tax, the Judiciary is forbidden to interfere between him and the State, and he is not entitled to a trial by Jury—the ~~use~~ of the trial by Jury, before the Constitution of '98, being subject to that limitation. These exceptions to the usual course of administration, spring out of an inexorable State necessity, in the allowance of which, the wisdom of years has proved the general good to consist. Why should not the same necessity justify a relaxation of the stringent rule as to the qualifications of Jurors, in cases which involve County taxes; for they, also, are in a just view of them, a part of the *public* revenue? But we do not rest this case here. By the State Constitution, civil causes, with some exceptions, within which this case does not fall, are to be tried in the County where the defendant resides. There is no provision in the Constitution and Laws for a change of venue. This cause can be tried nowhere but in the County of Bibb, where all the defendants reside, and if not tried there, it cannot be tried at all. If citizens of *Bibb* are incompetent to try it, then it follows that the administration of the law utterly fails, and the State cannot compel the Collector to pay over the public money in his hands. In view of these things, we hold that the Legislature, when it authorized the collection of County taxes from the Collector and his sureties, had in view the fact that issues might be made to be passed upon by a Jury of the County, and that the laws thus authorizing the collection, operate a repeal of the Common Law, *in such cases*, so far as the amount of interest which the citizen might have in the issue, would, by the Common Law, disqualify them as Jurors. I do not perceive, that in those cases where in this country, the rigid rule of the Common Law has been enforced, the administration of the law would have failed, by reason of the impossibility of trying the cause elsewhere, or by reason of the impossibility of getting a Jury wholly unexceptionable, where the case was tried. In the case against the *Mayor, &c. of the City of Columbus*, the administration of the law did not fail by excluding citizens of

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Columbus; because a Jury could be had there from the citizens of the County, not resident within the corporation. In the case cited from *Bay*, the right of the Court to change the venue was recognized. Even in England, I am inclined to think, that the rule would be released in cases like this, when the exclusion would altogether defeat a trial. The very point was made in the case quoted from *Burrow*. Lord *Mansfield* did not determine, but seemed to waive it, by ruling, that as the case was made triable only in the Court of the corporation and by freemen of that corporation, by a law of their own, it was their own fault. His language is as follows: "it is said that if the defendant's challenges be allowed, the corporation will be left without a remedy on the by-law. The answer is, that if the fact be true, that they can impanel no Jury but freemen, the fault was their own, in confining the action to their own Court. On the other hand, if they had the power (as the City is a County of itself) to have impanelled non-freemen, it was their own fault that they did not." 3 *Burrow*, 1858. In thus ruling, we are sustained by the *Supreme Court of Massachusetts*. 5 *Mass.* 90. Our judgment is, that in cases against Tax Collectors, where the interest of the Jury is remote, slight and uncertain, and when their exclusion would defeat altogether the enforcement of the law against them, that the citizens of the County are not disqualified as Jurors, because of that interest.

Let the judgment be affirmed, generally.

No. 32.—STEPHEN, (a slave,) plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] Under the Act of February, 1850, transferring the trial of capital offences, committed by slaves and free persons of color, to the Superior Court, Jurors are to be impanelled and sworn in the same manner, as for the trial of crimes committed by free white persons.

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- [2.] A count for rape, and an attempt to commit a rape by a slave, on a free white female, may be united in the same indictment. The two counts are of the same nature; they require the same plea, the same judgment, and the same *quantum* of punishment.
- [3.] The proper time for the prisoner to avail himself of a misjoinder of counts, for distinct offences, and to compel an election, is when the indictment is read to the Jury. He may avail himself of the objection by demurrer, or on motion to arrest the judgment.
- [4.] In general, judgment on a writ of error will follow success in the particular issue. It is proper, however, to examine the whole record, and to adjudge either for the plaintiff or defendant, according to the legal rights, as it may on the whole appear, notwithstanding, or without regard to the issue in Law, which may have been raised and decided, between the parties.
- [5.] The party guilty of the first faulty pleading, cannot demand a repleader.
- [6.] Where a repleader is awarded, no error ought to be left upon the record.
- [7.] On an indictment for a rape, the Jury may find the accused not guilty of the offence charged, but of the attempt only, provided the evidence will warrant such finding. *Held*, that it will not vitiate the verdict, to swear the Jury to try the prisoner for the *attempt*, as well as the *rape*.
- [8.] In a prosecution for a rape, the fact of the woman's having made complaint soon after the assault took place, is evidence; the *particulars* of her complaint, however, cannot be gone into, and she will not be allowed to name the prisoner, as the person who committed the injury, unless by way of *information*, to lead to his arrest.
- [9.] A confession, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by flattery of hope, or by the impressions of fear, *however slightly the emotion may be implanted*, IS NOT ADMISSIBLE EVIDENCE.
- [10.] It is no objection to the competency of confessions, that they were made while the party was in *legal imprisonment*.
- [11.] A reversal upon writ of error, cannot be claimed on the ground that the Court in its charge, referred, by way of illustration, to evidence which was not in the record, provided the Jury were referred to the testimony, and directed to examine it for themselves; and were reminded that they were the exclusive judges of the facts, irrespective of any opinion which the Court might entertain or express, respecting them.
- [12.] A person who has committed an offence, may be convicted upon his own voluntary confession, although it is totally uncorroborated by any other proof.
- [13.] In England, the doctrine may be considered as satisfactorily established, whatever doubts may have been expressed in this county to the contrary,

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that *extra-judicial confessions*, uncorroborated by any other proof, as to the *corpus delicti*, are of themselves sufficient to convict the prisoner.

- [14.] A rape may be committed on an infant.
- [15.] A child under ten years of age, cannot consent to carnal intercourse, so as to rebut the presumption of force.
- [16.] Will not the same presumption be made in forcing one over ten, who is still a child in stature, constitution, and physical and mental developments? *Quere?*
- [17.] Every indictment is sufficiently technical in this State, which states the offence so plainly, that a man of ordinary capacity would readily understand the nature of the offence charged.
- [18.] The Courts will take judicial notice of the usual abbreviations of christian names.
- [19.] Upon an indictment against a slave for a rape on a free white female the verdict was, "we the Jury find the prisoner guilty of an attempt to commit a rape:" *Held*, that it was sufficiently full, and need not negative the charge of rape—that being the legal effect of the findings; neither was it necessary to add on a *free white female*—that being the issue submitted, the verdict is co-extensive with it.
- [20.] The XLVth section of the XIVth. Division of the Penal Code, enacts, that upon the trial of an indictment for any offence, the Jury may find the accused not guilty of the offence charged in the indictment, but guilty of an attempt to commit such an offence, without any special count in the indictment for such attempt, provided the evidence before them will warrant such finding. By the Act of February, 1850, indictments against slaves and free persons of color, charged with capital offences, are to be framed in the same manner as indictments against free white persons. *Held*, that the same incidents follow, as to the powers of the Jury, in finding the accused guilty of the attempt.

Indictment, in Houston Superior Court. Tried before Judge POWERS, October adjourned Term, 1851.

At the October adjourned Term, of Houston Superior Court, held in December, 1851, the Grand Jury found true the following bill of indictment:

"The Grand Jurors, &c. in the name and behalf of the citizens of Georgia, charge and accuse Stephen, a man slave, the property of Nunn Miller, of the County and State aforesaid, with the offence of rape; for that the said Stephen, as aforesaid, in the County aforesaid, on the 31st day of October, 1851, with force and arms, in and upon one Mary Daniel, the said

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Mary Daniel being then and there, a free white female in the peace of God, and said State, then and there being, violently and feloniously did make an attempt, and her, the said Mary Daniel, the said Mary Daniel being then and there a free white female, then and there forcibly and against her will, feloniously did ravish and carnally did know, contrary to the laws of said State," &c. The indictment also contained a count for "an attempt to commit a rape."

When placed upon his trial, counsel for defendant challenged the array of Jurors, upon the ground that the Jury chosen, summoned and impannelled to try said cause, were not chosen, summoned and impannelled, under any law authorizing the drawing, summoning and impannelling of Jurors, for the trial of a slave.

The Court refused to sustain the challenge, and counsel for defendant excepted.

Counsel for defendant moved the Court to compel the Solicitor General, to elect upon which count in the indictment he would go to trial, before the same was read to the Jury. Which the Court declined to do, and counsel for defendant excepted.

The Solicitor General swore the Jury to try the issue formed upon this bill of indictment, between the State of Georgia and Stephen, a negro man slave, &c. who is charged with the offence of rape and of an attempt to commit a rape, &c.

To which counsel for defendant objected, on the ground that they were sworn to try two issues. The Court overruled the objection, and counsel for defendant excepted.

The State introduced Mrs. Mourning Daniel, the mother of Mary Daniel, who testified that immediately after the commission of the act by the defendant, Mary Daniel told her that it was Stephen who injured her.

To which evidence, counsel for defendant objected.

The Court overruled the objection, and counsel for defendant excepted.

John W. Johnson, was introduced as a witness on the part of the State, who testified as to certain admissions, (in substance,

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that he was guilty of the crime) made by the defendant, when in custody of the Constable.

Counsel for defendant objected to the evidence.

The Court overruled the objection, and counsel for defendant excepted.

The Court, among other things, charged the Jury, "that though the prisoner's confessions were to be received with great caution, yet if they should find that they were corroborated by any part of the evidence testified to by other witnesses, they would amount to almost positive proof, and they might look into the testimony and see if his confessions were so corroborated. For instance, if they should find his confessions (made to Johnson) in regard to having sent for Mary Daniel, (who at the time was in an adjoining field) to bring him a pin, and making out he had a splinter in his finger, agreed with a similar statement made by her to her mother, it might amount to confirmation of his confessions. The Court, however, charged the Jury, that they were judges both of the law and the facts, and that they were not to be governed by any opinion of the Court, in criminal cases, if it differed from their own opinion of the law and facts, &c.

To which counsel for defendant excepted.

The Jury returned the following verdict: "We the Jury find the prisoner guilty of an attempt to commit a rape."

Whereupon, counsel moved an arrest of judgment.

Which motion was overruled by the Court.

Counsel for defendant then moved the Court for a new trial, upon several grounds, predicated upon the various exceptions taken in the progress of the trial, and also upon the form of verdict rendered by the Jury.

The Court overruled the motion for a new trial, and counsel for defendant excepted.

HALL and GILES, for plaintiffs in error.

Sol. General DeGRAFFENREID, for defendant in error.

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By the Court.—LUMPKIN, J. delivering the opinion.

The prisoner was indicted in the Circuit Court of Houston County, for a rape on the body of Mary Daniel. On the trial, the Jury found him guilty; and this application is to reverse the judgment of the Court.

I shall endeavor, as briefly and dispassionately as I can, to investigate the numerous points made by the record. The crime, from the very nature of it, is calculated to excite indignation in every heart; and when perpetrated by a slave on a free white female of immature mind and body, that indignation becomes greater, and is more difficult to repress. The very helplessness of the accused, however, like infancy and womanhood, appeals to our sympathy. And a controversy between the State of Georgia and a *slave* is so unequal, as of itself to divest the mind of all warmth and prejudice, and enable it to exercise its judgment in the most temperate manner.

[1.] It is insisted, in the first place, that the Jury which tried the cause, were not summoned, chosen or impannelled, under any law of force in this State, for that purpose.

It is conceded, that unless this proceeding was authorized by the Act of February, 1850, providing for the trial by the Superior Courts, of slaves and free persons of color, charged with capital offences, that it cannot be sustained. For the Acts of 1811 and 1816, are virtually, if not directly, repealed by this late Statute, changing the forum for the trial of capital offences, committed by this class of our population. Does this Act authorize this proceeding?

In the absence of any express provision, we should have entertained no doubt whatever, that the mere transfer of jurisdiction, from the Inferior to the Superior Court, carried with it to the latter tribunal all the means necessary and proper for its exercise. But we are not left to speculate upon this subject. For the Act itself declares, that after a bill of indictment is found true, by the Grand Jury, against the slave or free person of color, that "the trial shall proceed to *rendition of verdict*, in conformity

with the provisions of the Penal Code; and in case of conviction, the Judge shall pass sentence," &c. *New Digest*, 1019.

No argument or illustration could make the point plainer. The Juries for the trial of capital offences committed by slaves or free persons of color, are to be summoned, impannelled and sworn, in the same manner as are those for the trial of like crimes committed by free white citizens.

[2.] The next complaint is, that the Court overruled the motion made by the counsel of the prisoner, to compel the State's attorney to elect on which count in the indictment he would try the prisoner, before *swearing the Jury and charging them with the case*.

The indictment, as originally framed and found, contained two counts, one for rape, and the other for an assault with intent to commit a rape.

[3.] The prisoner might have availed himself of the objection upon demurrer to the indictment, or on a motion in arrest of judgment. The first application was made before a single Juror had been sworn, and it was repeated before the indictment was read. The Court very properly held, there being no demurrer filed to the form of the indictment, that it was not as yet judicially advised, that there were two counts in the indictment, and could not be, until it was read. And it might have added, that the Solicitor General might, *ex mero motu*, make the election. The motion was ultimately sustained, and the State elected to try on the first count.

Another view of this question, makes it equally conclusive to my mind against the plaintiff in error. In this case we are clear, that the defendant had no right to force an election. For the two offences charged in the indictment, being of the same nature, requiring the same plea, the same judgment, and the same quantum of punishment, the State might have proceeded to trial on both counts at the same time.

[4.] Admitting then, that the Judge committed a mistake in law, in not entertaining the motion at an earlier stage of the trial, still upon an examination of the whole record, finding as we do, that the second count in the indictment should not have been

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stricken out at all, we should adjudge for the State, the legal right upon the whole case being with the State. If the second count ought to have been permitted to stand, then it was no error in the Court to refuse to strike it out at any stage of the trial.

[5.] The party guilty of the first faulty pleading cannot demand a repleader. 1 *Chitty's Pl.* 694. *Stephens on Pl.* 120. *Walker vs. Walker*, 1 *Wash. (Va.)* 135. *Shelton vs. Pollock*, 1 *Hen. & Munf.* 427. *Hill vs. Harvey*, 2 *Munf.* 525, and the cases in the note. *Green vs. Bailey*, 5 *Munf.* 251.

And admitting there is error in the particular exception, the judgment will not be reversed, if it appear distinctly upon the whole record, that the prevailing party was entitled to succeed. *Haughton vs. Sleuk*, 10 *Vermt. Rep.* 520.

The object of a proceeding in error is to reach the judgment, and to avoid it, when it does not possess the elements upon which alone all judgments should stand. But a Court will never set aside a judgment, because error may have been committed upon some particular point, where an examination of the whole record conclusively shows, that the judgment was correctly rendered. *Oltin Harman vs. Kelly, Payne and others*, 14 *Ohio Rep.* 502.

Another familiar rule is, that an appellate Court will not reverse a judgment, where it is clear, from the entire record, that the plaintiff in error never can recover. *Rogers vs. McDill & Campbell*, 9 *Geo. Rep.* 506. 4 *Ala. Brock vs. Yongue*, 584.

[6.] Where a repleading is awarded, no error ought to be left upon the record. *Kempe vs. Crews*, 1 *Ld. Raymond*, 169. *Couper*, 510.

[7.] It is next objected that the Jury that tried the cause was not legally sworn.

Each of the Jurors was sworn, "well and truly to try the issue found upon the bill of indictment between the State of Georgia and Stephen, a man slave, the property of Nunn Miller, who was charged *with the offence of rape and an attempt to commit a rape*, and a true verdict to give according to evidence."

The issue submitted was rape or no rape; and *that*, the Jury

were sworn to try. They did, it is true, under this issue, find the prisoner guilty of *an attempt*. And holding as we do, that it was competent for the Jury to render such a verdict, we cannot see, why the fact that they were sworn to try him for *the attempt*, as well as *the act itself*, should vitiate the verdict.

[8.] In relation to that portion of the testimony of Mourning M. Daniel, the mother of the girl, in which she stated, that when her daughter complained to her of the injury done her, she said, "it was Stephen that hurt her," we find it somewhat difficult, upon principle, to sanction its admission. The general rule deducible from the books, seems to be that in a prosecution for a rape, the fact of the woman's having made complaint, soon after the assault took place, is evidence; and that the *particulars* of her complaint cannot be gone into. *Roscoe on Crim. Ev.* 23. By the laws of Scotland, the particulars of such declarations, when made *de recenti*, are received. But this privilege is extended to those accounts only which are connected more or less directly with the *res gestæ* of the injury; or which were so recently given after it, as to form, in some sort, a sequel to the actual violence. (*Id.*)

If this statement of the girl was uncorroborated by other proof, we should send this case back. If the identity of the offender was a debateable question, and there was a conflict of testimony respecting it, we should be unwilling to see the prisoner suffer a felon's death, however richly he may deserve it. But that the violence inflicted was done by Stephen, he never denied, but freely admitted, and all the proof points that way. The only effect of this statement was to lead to the arrest of the prisoner; and in that view of it, perhaps, it was not altogether objectionable.

[9.] Another assignment is, that the Court erred in admitting the confessions of prisoner, testified to by John W. Johnson—the same, as it is alleged, having been extorted by duress and the excitement of hope and fear.

Mr. Johnson testified that the Constable having the custody of Stephen, left him temporarily in his charge, and that, during his absence, the prisoner commenced conversing about the case, and

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said that, "he was very sorry that he had done as he had, and that had it not been for Anthony (another slave) he should not have acted so." Witness cautioned prisoner to be careful how he talked, for that it might cost him his life. He then asked him if the charge was true? He said, "Yes, but Anthony caused him to do it." He stated, "that he had heard, that if a girl was not large enough, that to tie something around her waist, would make her big enough. Mary did not make much objection to having the handkerchief tied around her, but when it came to throwing her down on the ground, she objected and struggled." He said, "he did not succeed in accomplishing his ends, she was too small." He said, "the devil had induced him to do it." The confession was made by the side of Moreland's store house, at Hayneville. The boy was chained at the time. He stated further, "he sent for the girl to bring him a pin, making out that he had a splinter in his finger, and in that way he got hold of her. She was picking cotton on one side of the fence, and he at work on the other." Witness, at the outset, advised the prisoner not to confess, and exhorted him to tell the truth if he said any thing.

[10.] We see nothing which would require these confessions to be excluded; no threats or promises, or improper contrivances of any kind, were used to influence the prisoner to make them. He spontaneously acknowledged his guilt, and designated Anthony as having instigated him to do the deed, before a word was spoken to him by Mr. Johnson. And then he was solemnly warned of the fatal consequences which might result to himself, from the disclosures which he might make.

It has been forcibly and truly urged that the human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail; and hence the humane rule of evidence, that a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope or by the impressions of fear, *however slightly the emotion may be implanted*, IS NOT ADMISSIBLE EVIDENCE. For the law

will not suffer a prisoner to be made the deluded instrument of his own conviction.

But here the officer who made the arrest had retired to administer some medicine, leaving Stephen in the charge of Mr. Johnson, and in the public village and immediate neighborhood no doubt of sundry persons, where coercion could not have been used without attracting attention ; with his mind as much at ease, as any one's could be, under the circumstances, he makes the minute statement which I have detailed, most of which is fully confirmed by the other proof, and which I must say, carries upon its very face, a probability which leaves but little room to doubt its truthfulness.

For myself, I concur fully with Mr. Phillips, that the cases are probably rare, in which unfounded self-accusations occur, or at least where a Jury would be misled by them ; and that the rule which excludes confessions, has been extended quite far enough, and applied in cases where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the strong and universal motive of self-preservation. *Treatise on Evidence*, 424.

In Scotland, all confessions are admissible, leaving their credit with the Jury. 2 *Allison's Crim. Law of Scotland*, 581, 582. And I am not prepared to say, that this is not the better practice.

[11.] Another reason for reversal is, that the Court charged the Jury, "that though the prisoner's confessions were to be received with great caution, yet if they should find that they were corroborated by any part of the evidence, testified to by other witnesses, they would amount to almost positive proof; and they might look into the testimony and see if they were so corroborated. For instance, if they should find his confessions in regard to having sent for Mary Daniel to bring him a pin, and making out he had a splinter in his finger, agreed with a similar statement made by her to her mother, it might amount to confirmation of his confessions. The Court, however, charged the Jury, that they were judges both of the law and of the facts,

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and that they were not to be governed by any opinion of the Court."

The complaint is, that the Court predicated its charge upon testimony which did not exist; that it did not appear that Mary Daniel had made any such statement to her mother, respecting the pin and the splinter, as that which was related by the prisoner to Mr. Johnson. Grant this to be true, and what is the consequence? Why, that not finding this confession thus corroborated by the statement of the girl to her mother, so far from the confessions of the prisoner being confirmed, they would be weakened, for want of this corroboration. They would have to stand upon their own naked strength. The defendant, therefore, could not have been injured by these instructions, more especially as the Jury were directed and encouraged to examine the testimony for themselves, and were reminded, that they were the judges in the last resort in criminal cases, both of the law and the facts, and that they should not be biassed by any opinion which the Court might give.

[12.] We come now to an important point. It is alleged that the verdict is not only contrary to law, but unsupported by any legal and sufficient evidence to warrant the finding.

Having already decided that the confessions of the prisoner were properly admitted, the force of this objection would seem to be entirely obviated; for if the prisoner spoke the truth, he is guilty beyond a reasonable doubt.

But it is argued with great earnestness and ability, that confessions are the weakest of all evidence, and should always be received with suspicion; that words are often misreported, through ignorance, inattention or malice; and that at best, they are extremely liable to misconstruction; moreover, that this species of evidence is not, in the usual course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts, may be, and often is, confronted.

And this course of reasoning is sanctioned by high authority. *Foster's Discourses*, 243. Approved by *Sir W. Blackstone*, 4 *Com.* 357.

And it cannot be doubted that innocent persons have con-

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fessed themselves guilty of crimes of the gravest nature. 1 *Leach*, 264, (note.)

Still the rule of criminal evidence remains unimpeached, that a person who has committed an offence may be convicted upon his own voluntary confession, although it is totally uncorroborated by any other proof. 2 *Stark. Ev.* 53. *Chitty's Crim. Law*, 570. *Hone's Case*, *Dyer*, 214. *Francis' C. C. H. W.* 58. *Fisher's Case*, *Leach C. C. L.* 3d edit. 349. *Wheeling's Case*, *lb.* *Hawk. b. 2 c. 46*, §39. *Eldridge's Case*, *Russ. & Ry.* 440. 1 *Phil.* 80.

[13.] And notwithstanding doubts have been expressed by American writers, whether *extra-judicial confessions*, *uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to convict the prisoner, yet I apprehend, that the doctrine may be considered as having been satisfactorily established in England. Such was the opinion of the *twelve Judges*, on an indictment for robbery, where the person robbed did not appear at the trial. *Falkner & Bond's Case*, *Russ. & Ry.* 481. See also, *White's Case*, *lb.* 508 ; *and *Lippel's Case*, *lb.* 509.

But passing by the contrariety of opinion upon this point, is there, I ask, no corroborating circumstance as to the *corpus delicti* in this case? To corroborate, is to strengthen—to confirm by additional proof. Do not the facts stated by the prisoner comport with facts otherwise known and established? Is not his account of the treatment of the little girl, and the cause of his failure, rendered more probable, by the evidence of other witnesses?

• Both of the parents testify that there were marks of great violence and abuse upon her person, having no earthly doubt as to the nature and extent of the injury she had suffered. I forbear to detail the facts ; they are spread out in the bill of exceptions. She seemed, upon returning, just at night, hurriedly home, to be alarmed and in the deepest distress. From appearances, the injury had just been inflicted. Three large holes were cut in her dress ; she and the negro were at work near each other, in adjoining fields, with a fence between. That her person had been violated, is not disputed, and every appearance indicated that it

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was forcible and against her will ; I repeat that these facts corroborate, in a striking and remarkable manner, the confessions as proved.

But suppose it were otherwise, I should hesitate long before I could get my consent to let the prisoner escape.

[14.] Anciently it was doubted, whether a rape could be committed upon a child under ten years of age. And therefore the Act of 18 *Elizabeth*, ch. 7, §4, was passed. The authorities going to show that a rape, at Common Law, could be committed on a female under ten years, considered it immaterial whether she consented or not.

[15.] The Common Law principle is, that a child under ten years of age is incapable of consenting. The same construction has been put upon the Statute of *Elizabeth*. Hence Lord *Hale* defines rape to be, the carnal knowledge of any woman above the age of ten years, against her will, and of a woman's child under the age of ten years, *with or against* her will. 1 *Hale*, P. C. 628.

[16.] Now, it will be readily perceived, that the period of ten years designated here is altogether arbitrary. There is, and from the very nature of the case can be, no definite time fixed by law, to infer puberty. It depends more upon the constitution and habits of body of the party, than upon age. In cities these developments are made earlier than in the country ; there females are often found living in a state of open prostitution, at the early age of 12 or 13 years.

The law, to be sure, has said, by implication at least, that where consent is given, after ten years of age, a rape cannot exist. But this, after all, is a mere presumption, and may be rebutted. Has it not been overcome by sufficient evidence in the present case?

The parents testify that their daughter is sickly and weakly, and poorly grown. Her mother swears that she is nothing but a child ; that she had never had her monthly courses ; and that there was no appearance of womanhood about her. Is this "weak-minded" creature, as she is shown to be, and on which account partly, she was not brought as a witness upon the stand, capable of consenting to such a deed ? Could she have sought

her own gratification? As well pretend that the infant is lustful in its cradle. There may be, and doubtless are, extraordinary instances of the early birth of the passions; but this poor creature is not one of them. It would ill-become her to play the wanton; her physical condition, if not her tender age, rendered lewdness with her, an impossibility.

In view then of her condition, both as to body and mind, why was she not as incapable of consenting, as females of ten years of age and younger are, ordinarily? Like all other children, she lacked the instinctive intelligence to comprehend the nature and consequences of this atrocious act—to reason upon duty—to distinguish, morally and legally, between right and wrong—to have the consciousness of guilt and innocence clearly manifested.

I would not put common seduction upon the same footing, and confound it with rape. In the present case, however, the consequences are pretty much the same to the unhappy victim, her family and friends, and to society at large. Over her and them, the defendant's unhallowed lust, has thrown a dark cloud, which will hang over them forever. The entrance of sin into this lower world, has brought no sorrow like this. But believing, as I do, from the evidence, that the passions of this girl had not arrived to that maturity, to authorize a supposition of a sexual connection, *with her consent*, and seeing that her person has been most shamefully outraged; I would, were I in the Jury-box, sieze upon the slightest proof of resistance—notwithstanding she may have been enticed to give her consent, in the first instance—even the usual struggles of a modest maiden, young and inexperienced in such mysteries, to find, in just such a case, that the act was against her will, and that the presumption of law was so strong, as to amount to proof of force.

[17.] The next objection is, that the indictment does not sufficiently charge the defendant with any crime of which a slave can be convicted. That it charges him with the offence of committing a rape, whereas it should have charged him with the offence of committing a rape upon a free white female.

Will the age of technicalities never pass away? Shall the law, affecting the dearest interests of men, their property, life and char-

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acter, "coming home to their businesses and bosoms," never become a popular science?

The Legislature, in 1833, declared that every indictment or accusation, should be deemed sufficiently technical and correct, although in omitting *fictions, repetitions and technicalities*, it left a hole in *Chitty's & Archbold's Old Forms*, large enough for a loaded cart and horse to pass through, provided it stated the offence in the terms and language of the Code, *or so plainly*—(what a pregnant clause!) that the nature of the offence charged, might be easily understood by the Jury.

What does this indictment set forth? "That the Grand Jurors, whose names are there recorded, sworn, chosen and selected for the County of Houston, in the name and behalf of the citizens of Georgia, charge and accuse Stephen, a man slave, the property of Nunn Miller, of the County and State aforesaid, with the offence of rape. For that the said Stephen, on the thirty-first day of October; in the year eighteen hundred and fifty one, with force and arms, in and upon one Mary Daniel, *being then and there, a free white female (?)* in the peace of God, and said State, then and there being, violently and feloniously, did make an attempt, and her the said Mary Daniel, *the said Mary Daniel being then and there a free white female*, then and there forcibly, and against her will, feloniously did ravish, and carnally did know, contrary to the laws of said State, the good order, peace and dignity thereof."

The indictment, if defective at all, is so on account of its redundancy. It needed pruning instead of enlarging. There is *too much* in it, rather than *too little*. It is twice alleged, that Mary Daniel is *a free white female*. What man of rational understanding could fail to comprehend the offence for which this negro was prosecuted? *and this alone is the criterion of sufficiency.*

[18.] The next objection is of a similar character. It is that only seventeen Grand Jurors have found the bill, there being only that many names written out in full in the body of the indictment, one of them being written thus: Jas. W. Belvin.

In Studstill vs. The State, (7 Geo. Rep. 2,) this Court held,

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that the abbreviation *Thos.* for *Thomas*, in the name of the foreman of the Grand Jury, indorsed upon the back of the indictment, and written in full in the body of it, was no variance; that is, they were the same name.

In Fenton vs. Perkins, (3 *Missouri Rep.* 106,) the Supreme Court held, that the abbreviations of names—given names, were so common, that without any violence to the laws of the land, the Courts may take judicial notice of them; and such is our judgment.

[19.] An objection was taken to the form of the verdict, that it does not, with sufficient certainty, find the prisoner guilty of any offence, for which a slave can be capitally or otherwise convicted. The verdict is, "we the Jury find the prisoner guilty of an attempt to commit a rape." John W. Cress, foreman.

It is contended that the verdict is not full enough; that it should in the first place have negatived the charge of rape, and gone further and found the attempt to have been upon a free white female.

Under an indictment for murder, the Jury may find a verdict for manslaughter, either voluntary or involuntary. But it has never been the practice for the Jury to negative, by their verdict, the charge of murder. It might be well enough, perhaps, for the Court, in rendering judgment upon such a finding, to pronounce a judgment of acquittal for the higher offence; for such we apprehend to be the legal interpretation of the verdict. The objection, if good at all, therefore, and we do not say that it is, should have been to the judgment of the Court, and not to the verdict of the Jury. The State puts the prisoner upon his trial for rape, and not having exhibited evidence sufficient to convict him of this offence, the Jury found him guilty of the attempt. He is consequently entitled to a judgment of acquittal as to the rape.

As to the form of the verdict, it appears to us, to be sufficiently full. The Jury found the defendant guilty of an attempt to commit a rape. What rape? Of course that charged in the indictment, on Mary Daniel, a free white female.

[20.] The only remaining point is this: rape, and an attempt

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to commit a rape, by a slave or free person of color, upon a free white female, are both capitally punished by the laws of this State. It is argued, that these are distinct offences, and that they must be separately prosecuted, and that the XLVth section of the XIVth division of the Code, which provides, that upon the trial of an indictment for any offence, the Jury may find the accused not guilty of the offence charged in the indictment, but guilty of an attempt to commit such an offence, without any special count in said indictment for such attempt, provided the evidence before them will warrant such finding—applies to offences committed by free white persons, and not to such as may be committed by persons of color.

And the proposition, as thus stated, is certainly true. The Penal Code was not intended to apply to slaves or free persons of color, in any of its enactments, unless they are expressly mentioned.

But the Act of February, 1850, which has heretofore been cited, makes it the duty of the Solicitor General, *to frame* and send before the Grand Jury, bills of indictment against colored persons charged with capital crimes, in the same manner as in cases of free white persons—the Act obviously designing to place both in all respects upon the same footing.

Under the Code, a free white person could be indicted for a rape and convicted of the attempt, without any count for the attempt. And now the indictment against the slave or free person of color, *is to be framed in the same manner*, of course the same incidents must attach to each.

Being satisfied that the errors assigned are not sufficient to arrest the judgment, and save the accused from the consequences of his crime, he must be left to abide the penalty of that awful sentence, which adjudges him to be unworthy to have a place longer among the living.

No. 33.—G. M. LOGAN, plaintiff in error, vs. A. S. GIGLEY, defendant.

[1.] A Court of Equity will not entertain a bill for the purpose of correcting an alleged *mistake*, in regard to *the facts* stated in a bill of exceptions, and certified by a Judge of the Superior Court, according to the provisions of the Act of 1845, organizing the Supreme Court of Georgia: especially, when the party tendering such bill of exceptions, made no complaint of any mistake therein, until after the argument of the cause in the Supreme Court, upon such bill of exceptions, and the judgment of the Court thereon. The Act of 1845 points out a different remedy, when the presiding Judge shall refuse to certify a bill of exceptions *properly* tendered; that is to say, if such bill of exceptions be *true and consistent* with what has transpired in the cause before him.

In Equity, in Bibb Superior Court. Decision on demurrer, made by Judge STARKE, July Term, 1851.

The bill charges, that in 1849, the defendant instituted his action against one John G. Myers and the complainant, alleging that Myers, as principal, and complainant as security, made and executed to him (Gigley) a bond for titles to a certain lot in the City of Macon, and that they had failed to make titles to said lot in terms of said bond; and that to this action, complainant (Myers not having been served) pleaded, among other things, that the bond was given by Myers, as administrator of Charles T. England, deceased, on a contract of sale of the real estate of England, made privately and contrary to law. And when the plaintiff had closed his case, the bill alleges that complainant moved the Court to non-suit the case, on the following, among other grounds:

“That the testimony showed, that the undertaking in the bond was illegal and void, and that the obligors and obligees were cognizant of it, and *particeps criminis*, in this, that it was an obligation on the part of Myers, as administrator of Charles T. England, to sell the real estate of deceased, contrary to the Statutes regulating the sale of intestates’ real estates. The

Court refused the motion to non-suit, and a verdict was found against the complainant.

The bill charges, that to the decision of the Court, complainant excepted, and by writ of error, carried the same to the Supreme Court; that when the bill of exceptions was presented to Judge STARKE, for his signature, counsel for Gigley added to the first ground, the following: "There was no evidence to show the knowledge of plaintiff, to the fact stated, other than the bond in evidence," which the bill charges was a mistake.

The bill charges, that in consequence of this mistake, he has been injured and damaged, because the Supreme Court, in the case made and carried up by said bill of exceptions, sustained the legal defence set up by complainant to said action, but decided that the same was not proved.

The prayer of the bill was that the judgment rendered and *fi. fa.* issued in said case might be decreed to be set aside, annulled and cancelled, &c.

To this bill, the defendant filed a general demurrer.

Which, at the hearing, was sustained by Judge STARKE, and the bill dismissed.

To which decision, counsel for complainant excepted.

COLE & WHITTLE, for plaintiff in error.

R. HARDEMAN, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The object of this bill is professedly to correct what is alleged to have been a *mistake*, by the presiding Judge of the Superior Court, in certifying and signing the bill of exceptions, as stated in the record. By the Act of 1845, it is made the duty of the Judge of the Superior Court, upon the exhibition of a bill of exceptions, to certify and sign the same, if such bill of exceptions *be true and consistent with what transpired in the cause tried before him.* 1 Kelly, 7. The complaint now made is, that the bill of exceptions, which was certified and signed by the

Judge of the Superior Court, is not true and consistent with what transpired in the cause; but that there is a *mistake* in regard to the facts as certified to by him, by means whereof, on the argument of the cause before the Supreme Court, the judgment of the Court below was affirmed. If there was such a mistake as is alleged, on the part of the presiding Judge, the parties were rather slow in discovering it. The cause was prepared for argument and was argued before this Court without any complaint as to the alleged mistake. The judgment of this Court, in that case, will be found in 9 *Geo. Rep.* 115. The counsel of the parties, and especially the counsel for the plaintiff in error, must be presumed to have been familiar with his bill of exceptions, both before and at the time of the argument before this Court; and in our judgment, it would be establishing a very dangerous precedent, to permit parties to attack or impeach a bill of exceptions, after judgment rendered thereon, as the complainant now proposes to do, if there existed no other objections to such a remedy. But the 6th section of the Act of 1845, organizing the Supreme Court of Georgia, provides the appropriate remedy, when the Judge of the Superior Court shall refuse to certify a bill of exceptions, when *properly* tendered; that is to say, when a bill of exceptions is tendered to the Judge of the Superior Court, which is *true* and *consistent* with what has transpired in the cause before him. The proceeding now before us, seeks to correct the bill of exceptions, the verification of which, the law devolves upon the Judge of the Superior Court, without making that officer a party or giving him an opportunity to be heard in regard to his official conduct. There are, doubtless, many bills of exceptions tendered for the certificate of the presiding Judge, in which counsel, in their zeal for the cause of their client, may think that officer is *mistaken*, as to what actually transpired before him on the trial of the cause; but nevertheless, the law makes the Judge the *arbiter* to decide between them, and it affords no jurisdiction to a Court of Equity, to interfere and set aside a judgment rendered upon such a bill of exceptions; the more especially, as the party who tendered such bill of exceptions, never made any complaint, or took any

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step to correct it until after the hearing thereon, in the Supreme Court. This case is not entitled to the favorable consideration of a Court of Equity, for another reason. The present complainant, in his plea to the original suit, which is part of the record before us, alleges, that "the bond, which was the foundation of the suit, is illegal and void, because given by the administrator of Charles T. England, on a contract of sale of the land of his intestate, which was made privately and contrary to the Statutes in such cases made and provided, within the *knowledge of all the parties to said bond*, and in *fraud* of the Statutes regulating the sale of intestates' property."

The complainant seeks to be relieved from a judgment founded on a contract, which, according to his own showing, is in violation of the Statutes of this State, and in contravention of public policy. 1 *Story's Eq.* 295, §298. *Howell, administrator, vs. Fountain et al.* 3 *Kelly*, 176. In every view which we have taken of this case, the judgment of the Court below, sustaining the demurrer and dismissing the complainant's bill, must be affirmed.

NO. 34.—THE JUSTICES OF THE INFERIOR COURT OF PIKE COUNTY and others, plaintiffs in error, vs. THE GRIFFIN AND WEST POINT PLANK ROAD COMPANY, defendants in error.

- [1.] Equity will not interfere to enjoin a mere trespass: there must be something special in the nature of the trespass, to authorize an injunction.
- [2.] Equity will enjoin a trespass, where the damages cannot be proven at Law, and the remedy is, on that account, inadequate and incomplete.
- [3.] Whether the damage is or is not irreparable, is a conclusion of law, which the Court draws from the facts and circumstances in regard to the trespass set forth in the bill.
- [4.] A bill is filed to enjoin a trespass, and also, to decree specific performance of an agreement: *Held*, that if the answer swears off the equity

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as to the agreement, yet admits the trespass, the injunction will not be dissolved.

[5.] In a bill for specific performance, and also to enjoin a trespass, the answer admits the trespass, and in words, denies the agreement set out in the bill; admitting, however, the facts, in part, which make up the agreement, and the facts, in part, which show that it was entered into, upon a motion to dissolve upon the coming in of the answer: *Held*, that there is enough admitted to retain the injunction.

In Equity, in Pike Superior Court. Decided by Judge STARKE, at Chambers, January 8th, 1852.

The bill charges, that the Plank Road Company, by virtue of its charter, granted in 1849, had constructed about some thirteen miles of their road, in and through the County of Pike, on which they had erected two toll-gates. The bill charges, that for the purpose of settling difficulties that had occurred between the Justices of the Inferior Court of said County, and said Plank Road Company, in consequence of the latter appropriating to their use the public high road, leading from Griffin, in said County, to the Flat Shoals on Flint river, in said County, the said Company cut out a road running along and near said Plank Road; upon the cutting out of which road, the said Justices agreed and consented to dismiss a suit which they had instituted against said Company.

The bill charges, that in violation of said agreement, the said Justices, on the 7th day of July, 1851, passed an order, notifying the Commissioners of Roads in the districts through which said Plank Road runs, that said toll-gates were obstructions on the said Flat Shoals road, with the intention of directing said Commissioners to remove said toll-gates, under pretence of legal authority; that the commissioners of the 545th District, acting under said order, on the day of 1851, cut down one of said gates; that the Company had again erected said toll-gate, and was apprehensive that the said commissioners, acting under the order of said Court, would again cut it down, &c. &c.

The prayer of the bill was for an injunction and specific per-

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formance of the agreement, as charged in the bill, on the part of said Court.

In their answer, the defendants admit the construction of the Plank Road; they deny that any agreement was ever entered into by them, with the said Company, in relation to the latter cutting out a new road, along and near said Plank Road.

They admit that said Road was cut out, as charged in the bill, but that the same was hardly passable.

They admit that the order was passed, as charged in the bill, and that the commissioners of the 545th district had proceeded, under said order, to remove one of the toll-gates erected by said Company; and that the Company had again erected said gate; and that it was their intention, and had given notice to have it again taken down, &c.

The defendants also filed a demurrer to the bill, alleging that there was no equity in the bill, and that complainants had a full and complete remedy at Common Law.

Upon the coming in of the answer, counsel for defendants moved to dissolve the injunction.

The demurrer and answer were, by consent, heard together.

Judge STARKE overruled the motion, and counsel for defendants excepted.

GREENE & ARNOLD, for plaintiffs in error.

ALFORD & MOORE, for defendants in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The doctrine of injunction to restrain trespass, has been so often considered by this Court, that I am under no obligation to discuss it. What we have to do in cases of this kind now, is to inquire whether they fall within the principles settled.

[2.] This case falls within the rule, that when it is impossible for the plaintiff to prove fully his damage at Law, the injunction will be allowed. The bill charges, that the Plank Road Company had, at the expense of some thirty thousand dollars, in

accordance with the provisions of their charter, constructed a Plank Road, for thirteen miles in the direction of West Point, from the City of Griffin; and that they had erected upon it, two gates for the purpose of collecting tolls; that a controversy having arisen between the Company and the Justices of the Inferior Court of Pike County, relative to an alleged violation of their charter, in appropriating a public highway of the County, for the construction of their road, and a suit pending in favor of said Justices, against said Company, to settle that controversy—overtures were made by the Company to the Court, for an adjustment of the same; that the Court came to terms with the Company, and it was agreed between the parties, that if the Company would construct a road along the line of the Plank Road, for the public use, and would permit the citizens of Pike County to travel on and use the Plank Road, free of charge, until said new road was completed, that the Inferior Court would abandon their suit and be at peace; that in pursuance of this agreement, the Company, in good faith, opened the new road along the line of the Plank Road; but that the Inferior Court, in violation of their agreement, passed an order, directing the Commissioners of the two districts in which the gates were situated to remove all obstructions from the public highway, on which the Plank Road was built; that the Commissioners of Roads, for one of the districts, acting under this order, did cut down and remove one of the gates; that the Company erected another gate, and that they had been notified by said Commissioners, that they would remove it again; that the Road Commissioners of the other district, failing to obey their order and remove the other gate, the Inferior Court had threatened to have them removed, and that they would put in Commissioners that would remove the gate in that district. These are, in substance, the charges made in the bill. The complainants, the Plank Road Company, aver that the damage done to them is irreparable, and pray an injunction against the Inferior Court, farther trespassing by removing their toll-gates, and that they be decreed to perform their agreement. A demurrer was filed, and overruled by the Court, and the defendants excepted.

In the argument, counsel contended that the charge, that the damage to the complainants is irreparable, is badly pleaded, in this, that the bill does not state how and wherein it will be irreparable; and as the demurrer admits to be true only matters that are properly pleaded, this allegation is not to be taken as true. The averment, that the injury is irreparable, does not make it so, nor is that to be taken as true because it is averred.

[3.] The irreparability of the injury is a conclusion which the law draws from the character of the trespass. The character of the trespass being exhibited in a statement of the facts which constitute it, those facts are admitted to be true by the demurrer, and it is for the Court to determine whether it is irreparable. A trespass is irreparable, when, from its nature, it is impossible for a Court of Law to make full and complete reparation in damages. And that is one of the cases in which Equity will interpose its preventive power. This is such a case. The power is as necessary to the peace and order of society, and to the enjoyment of the right of property, as any that belongs to a Court of Chancery. It is well understood that Equity will not interfere in a case of a mere trespass. As a general rule, it leaves the party to his legal remedy. But if there is any thing special in the case—anything which renders the remedy at Law impossible or incomplete—impossible, for example, when the trespasser is insolvent; or incomplete, when, from its nature, it is impossible to prove the damage which grows out of the trespass—Chancery will put forth its restraining hand, and by a decree, compel the wrong-doer to desist. The injury done to this Company, is not alone the destruction of their toll-gate. If that was all, the value of the gate would be the criterion of damages; and that being susceptible of proof, a Court of Law could give redress. If that were the case, we would dismiss this bill. The toll-gates are the authorized means by which the Company collects its revenue—the means by which the stockholders are to receive the profits on their money—the means by which the grant in their charter is made available. It does not matter that there are other means by which they would be enabled to collect tolls. It is sufficient, that they believe that

gates are the best means for them, and that their charter authorizes their use. What then is the injury? It consists in preventing them from collecting tolls—in realizing the profits which their road may make upon the stock—in short, it defeats the privileges and immunities of their charter, and nullifies the legislative grant. How is such injury to be proven? Who will prove what will be the income of this road for a day, or a week, or a year? How could the value of the grant be sworn to by any witness? Or, how would it be possible to prove, what would be the actual diminution of the tolls, occasioned by a demolition of the toll-gates, for any specified time? It could not be done. The remedy at Law would be, for that reason, to say the least of it, exceedingly uncertain and incomplete. It is clearly a case for an injunction, and the demurrer was very properly overruled. 1 *Kelly*, 7. 5 *Ga.* 576. 7 *Ga.* 49. 8 *Ga.* 118. A motion was made to dissolve the injunction, after the answer came in, upon the ground that the equity was sworn off, which the Court disallowed, and the defendants excepted.

[4.] It is to be remarked that this bill has two phases. It seeks an injunction against the *trespass*, and it also seeks a performance of the *agreement*. The answer very clearly admits the *trespass*, and all the circumstances upon which the injunction is asked. If then it denies the equity of the bill, so far as the *agreement* is concerned, I do not see how the injunction can be dissolved. What has the *agreement* to do with the injunction? If the charges in the bill be true; that is, if the *agreement* was made and violated as stated, then was the *trespass* more aggravated. But if untrue, if there was no such *agreement*, or if it had been kept by the Inferior Court, that is, if they had dismissed their suit against this Company; still, there would be sufficient ground for the injunction. But aside from this view of the matter, the answer does not swear off the equity of the bill as to the *agreement*. In our opinion, if the motion had been to dismiss the bill so far as it goes for a decree on the *agreement*, we could not sustain it. The answer admits enough to retain the bill for a hearing.

[5.] It denies, in so many words, that the Inferior Court entered into any such agreement, it is true. But from what it does admit, it is obvious that this is only the conclusion which they arrive at, as to what acts on the part of the Court, would amount to the making of an agreement. They say that two of the *directors*, not having authority from the Company, to close any agreement with them, suggested to three of the Inferior Court, that some arrangement of the controversy be made, and requested them to make a proposition; and that they did propose, in writing, to settle the difficulty upon the terms stated in the bill. The record shows that this written proposition, signed by three of the Court, was of file in the office of the Clerk of the Inferior Court. They deny that there was any acceptance of this proposition by the Company, and if accepted, that they had any notice of it; but at the same time, they admit that the Company did proceed to act upon it, and did construct the new road, which was free to the public; and they also admit that whilst constructing the new road, they did open their gates to the people of Pike. It is also true, that they say that this new road was not a good one; and in their answer they deny that the Company has any right, under their charter, to locate their road in the manner they did, upon the old highway. The amount of all which is this: they, in words, deny, out and out, the agreement; but state facts enough to amount to such an admission of the charges in the bill, as must, in our judgment, carry the cause to a hearing. Whether the complainants will get a decree, when the cause is heard, is a different question—whether they would be entitled to one on this answer alone, is also a different question, upon which it is not our province to express an opinion. The Reporter's brief not being very full as to the answer, my statements are, in part, taken from the answer itself.

Let the judgment be affirmed.

No. 35.—THOMAS GRADY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] The *attempt* to procure a slave to commit a *crime* or *misdemeanor*, under the amendatory Act of 22d February, 1850, means an offence which, if committed, would constitute a crime or misdemeanor in a *free white person*.
- [2.] Negro testimony is inadmissible against a free white person. It is competent, however, to state that *certain acts were done*, in consequence of information received from a negro.
- [3.] It is not only the privilege of the Court, but its solemn duty, to interrupt counsel, when misstating the testimony to the Jury.
- [4.] Whether or not the *venue* be properly laid in a bill of indictment, when the facts are not disputed, is a question of law for the Court.
- [5.] When a party is convicted upon a capital charge, it is proper to ask if he has any thing to say why judgment of death should not be pronounced on him. But in minor felonies, the omission of this ceremony, will not be a sufficient ground for reversing the judgment; provided it appears that the prisoner and his counsel were both in Court, when the sentence was pronounced, and urged nothing in arrest of judgment, or in mitigation of defendant's guilt.

Indictment, in Troup Superior Court. Tried before Judge HULL, November adjourned Term, 1851.

At the November adjourned Term, 1851, of Troup Superior Court, Thomas Grady was placed upon trial, on an indictment for "an attempt to procure a slave to commit a crime."

The facts, as disclosed by the evidence, were these: On the night of the 12th of July, 1851, in the County of Troup, the defendant was heard counselling and advising a negro slave, named James, the property of Robert O. Moreland, of Meriwether County, to induce and carry away to some free State, two negro slaves, to wit: "Fed and Adam," the property of said Moreland.

On the trial, counsel for defendant moved to quash the indictment, on the ground that the offence charged in the bill of indictment was not a crime, under the Statute.

Which motion the Court overruled, and counsel for defendant excepted.

In the progress of the trial, Robert O. Moreland was introduced on the part of the State, and testified to the sayings of the negro boy "Jim."

To which no objection was made by counsel for defendant, at the time, but the same was taken as a ground in this bill of exceptions, and the admission of the evidence assigned as error.

The evidence was closed, and while counsel for the defendant was commenting upon the same, before the Jury, the Court interrupted him and required him, "to read on further, and he would see that the witness did not say what he was attempting to make it appear that the witness did say, from that portion of the testimony counsel had read," *which fact counsel, on reading through the testimony, admitted, but excepted to the conduct of the Court in interrupting him.*

Counsel for defendant requested the Court to charge the Jury, "that if the act to be performed by the boy Jim, was to be performed in Meriwether or any other County outside of Troup County, that they were bound to acquit the prisoner on the indictment."

Which charge the Court refused to give, but did charge the Jury "that the 'venue' was properly laid in Troup County."

To which refusal and charge, counsel for defendant excepted.

The Jury found the defendant guilty, and the Court sentenced him to four years' imprisonment in the penitentiary, without calling on the defendant, (he and his counsel both being present) to know "if he had any thing to say why sentence of the law should not be pronounced upon him."

And counsel for defendant excepted, and upon these several exceptions assigned error.

JOHN L. STEPHENS, for plaintiff in error.

SOL. GENERAL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first error complained of is, the refusal by the Court,

to dismiss the indictment, on the ground that it charged no offence.

The Act of 1850 declares, "that if any free white person shall attempt to procure a slave to commit a crime, by counsel, persuasion, bribery, force or other means, he shall be presented for such attempt, and if found guilty, shall incur the same punishment as if such free white person had attempted to commit the same crime, which he attempted to procure the slave to commit." *New Digest*, 780, 781.

The offence charged in the indictment is, "that Thomas Grady, the defendant, did attempt, by counsel and persuasion, to procure a negro man slave, by the name of Jim, the property of Robert O. Moreland, feloniously to take, steal and carry away, two negroes. Fed and Adam, the property of said Moreland," &c. And inasmuch as it is no crime, for one slave to steal another, it is insisted, that to procure it to be done, by a white man, is no offence, under the Statute. But we apprehend, that the intention of the Act, is not to make punishable attempts to perpetrate acts, which if consummated, would be a crime in a *slave*, but a crime in a *freeman*.

The design of the Legislature in the passage of this law, and the previous Act of 1838, of which it is amendatory, was to make the white man responsible directly, for crimes committed or attempted, through the agency of negroes, and to substitute the principal in the place of the subaltern. The proper inquiry therefore is, not whether, if the attempt had succeeded, it would have constituted an offence by the slave, but whether it would have been an offence, in the free white person, it having been done by a subordinate, through his counsel and procurement.

The very language of the law, is a key to unlock its meaning. Its speaks of an attempt to procure a slave to commit a *crime*; but if the stealing of negroes, is not a crime by a slave, but is by a white man, then the Statute, *ex vi termini*, refers to such acts only as are by law, criminal in white men.

Moreover, the construction contended for, would present this striking anomaly. An attempt to commit a rape by a slave on a free white female, is punished with death. *New Digest*, 987.

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The same offence by a free white man, is punished by imprisonment at labor in the penitentiary, for a term not less than one year, nor longer than five years. *New Digest*, 789. And yet the Act under consideration provides, that if the accused be found guilty, he shall incur the same punishment as if the free white person had attempted to commit the crime, which he attempted to procure the slave to commit. If the interpretation given to the Statute by the prisoner's counsel be correct, the offence of attempting to procure a slave to commit a rape on a free white female, would be capitally punished, such being the penalty annexed to the crime, if committed by a slave. Whereas the Legislature has expressly enacted that this offence, by a free white citizen, shall be punished only by imprisonment for a limited period at labor in the penitentiary.

Our conclusion is, that the crimes or misdemeanors spoken of in the Act of 1850, are such as may be committed only by a free white citizen.

[2.] The next error complained of, is in permitting the sayings of the negro Jim, to Robert O. Moreland, to go to the Jury in evidence. The witness testified that the negro told him that he was to meet a white man, at a certain place that night, without mentioning any name, and it seems from a previous portion of the testimony, that it was this information which induced the prosecutor, in company with others, to waylay the prisoner.

Having on two recent occasions, made known the views of the Court, upon this species of proof, namely, in *Berry vs. The State*, decided at Gainesville in October last, and *Whaley vs. The State*, decided at Columbus during the late January term, we deem it unnecessary to reiterate a third time opinions so deliberately and repeatedly expressed; especially as it appears from the record before us, that no objection was made to the testimony during the progress of the trial. The admission of illegal testimony will not sustain a writ of error to this Court, unless objected to, at the time of its introduction, or on the argument of the case. 9 *Geo. Rep.* 9. *Ib.* 121.

[3.] The third exception is, that counsel for the prisoner was interrupted by the Court, while commenting upon the evidence be-

fore the Jury, and told to read the whole of the testimony through, and he would discover that he was misrepresenting the witness; and he admitted upon further examination, that such was the fact. If this be so, it was not only the privilege of the Court, but its solemn duty, not to suffer the proof to be perverted, either intentionally or through inadvertence.

[4.] The next assignment of errors is, that the Court charged the Jury, that the *venue* was properly laid in Troup County. This opinion was elicited by a request, made by the attorney of the defendant, that the Court would charge the Jury, that if the act to be performed by the boy Jim, was to be done in Meriwether or any other County out of Troup, that they were bound to acquit the prisoner. The Court, in response to this request, instructed the Jury, as before stated, that the *venue* was properly laid in Troup County; and so we think; there the conspirators met and the scheme was concocted. There it was agreed between the prisoner and Jim, that for twenty dollars, Jim was to induce the other two negroes to escape and accompany Grady to Boston or some free State. It was from Troup, that Jim was despatched to confer with the other two slaves, and to make all the preliminary arrangements; and they were to meet the plaintiff in error in Troup, preparatory to their final exode. It was from Troup, that the directions were communicated to them, "to get their master's money, and to cut the damned old rascal's throat, if they could not obtain it otherwise." And it was here the defendant waited and watched for the return of his messenger, from this embassy of love and good will to man!

[5.] The only remaining ground is, that the Court sentenced the accused, without calling on him to know whether he had any thing to say why judgment should not be awarded against him.

We believe the law to be, and such is the practice, in case the defendant be found guilty upon a *capital charge*, for the prisoner to be present, not only at the rendition of the verdict, but that immediately or at a convenient time soon after, he should be asked by the Court, if he has any thing to offer, why judgment should not be pronounced against him. And in some early

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cases it was held, that if judgment be given on an indictment, without a demand of what the party had to say, it is erroneous. 3 *Mod.* 265. 8 *lb.* 26. 12 *lb.* 51, 95, 312. 1 *Ld. Ray.* 408. 1 *Shann.* 131. 1 *Sid.* 85. *Co. Ent.* 358. 2 *Hale*, 217. 3 *Com. Dig.* 513. 2 *Hawk P. C.* 438. And that even in clergiable offences, the ceremony was considered indispensably necessary, that the defendant should be asked by the Court or the Clerk, if he had anything to say why judgment of death should not be pronounced on him. 3 *Salk.* 358. *Comb.* 144.

According to the modern practice, however, this omission in minor felonies, will not be material, provided the defendant has not been deprived of an opportunity of moving in arrest of judgment, or any other legal right, to which he is entitled. Here, it is conceded on the record, that both the prisoner and his counsel were present in Court, when the judgment was pronounced; that nothing was urged against the legality of his conviction or in mitigation of his conduct. Under these circumstances, we do not think, that the omission of this form, is a sufficient ground for the reversal of the judgment.

Seeing no error in the proceedings of the Court below, we direct the judgment to be affirmed.

No. 36.—W. B. Scott, administrator, &c. plaintiff in error, vs. JOHN HADDOCK and Wife, defendants.

[1.] Where a guardian had been appointed for two orphan children, and in returning to the Court of Ordinary a schedule of their property, in which a certain slave, by the name of Harry, was returned as a part of their estate, and was hired out as their property, and annual returns thereof made to the Court of Ordinary, for ten consecutive years, by such guardian: *Held*, in a suit by one of the orphans, after her intermarriage, for her share of said slave Harry and his hire, against such guardian, that he was estopped, on the ground of public policy and good faith, from

- denying the title of the orphans to the slave in question, and showing an independent title thereto in himself, *anterior* to his appointment as guardian.
- [2.] The Statute of Limitations does not run against a direct or express trust, so long as the trust continues and is acknowledged to be a *continuing, subsisting trust*; but when the trust is denied by the trustee, and he claims to hold the trust funds or the trust property as his own, *adversely* to his *cestui que trust*, the latter having *knowledge* of that fact, the Statute will begin to run in favor of such trustee, from the time of such adverse claim or possession.
- [3.] Where there are two or more *co-existing* disabilities in the same person, at the time the cause of action accrues, as infancy and coverture, the Statute of Limitations does not run until both or all are removed.
- [4.] But where there exists but *one* disability, at the time the cause of action accrues, other disabilities, arising afterwards, cannot be tacked to the first disability, so as to prevent the operation of the Statute of Limitations.
- [5.] Disabilities which bring a person within the exceptions of the Statute, cannot be piled one upon another, so as to defeat its operations; but a party claiming the benefit of the proviso in the Statute, can only claim the benefit of the *disability* which existed when the cause of action accrued.
- [6.] Where a bill was filed by husband and wife, to recover the property of the wife in the hands of her guardian, the latter having repudiated the trust and claimed the property as his own, such *adverse* claim of the guardian being asserted during the *coverture*, and after the wife was *twenty-one years of age*: *Held*, that the wife was protected from the operation of the Statute of Limitations, she being a *feme covert* at the time the cause of action accrued.

In Equity, in Crawford Superior Court. Tried before Judge STARKE, August Term, 1851.

The bill charges, that Willis S. Scott was appointed guardian of John F. and Cynthia Prosser, minors of John Prosser, in the year 1821. His first return was made in 1822, in which he charges himself with a negro boy named Harry, the subject of the suit, and also for his hire. For ten consecutive years, he continued in his returns to account for the hire of the boy. His last return was made in 1831. Cynthia Prosser was born some time in the year 1816, and was married to John Haddock in 1835. On the 5th of January, 1836, Haddock had a partial settlement with Scott, as his wife's guardian, giving him a receipt for the articles turned over, and releasing him from all further claim, as such guardian, except as to the interest in

the boy Harry. Willis S. Scott subsequently died, and Willis B. Scott was appointed administrator on his estate.

The bill prays that defendant may come to an account and settlement with complainants, as the administrator of Willis S. Scott, deceased.

The defence set up by the answer, was the Statute of Limitations ; and also, that the negro boy, Harry, was the property of Willis S. Scott, acquired by his intermarriage with the mother of Cynthia Haddock, one of the complainants, who became the owner of the slave by purchase, subsequent to the death of her first husband, and prior to her intermarriage with defendant's intestate ; and that he was only returned by Scott, as guardian, as the property of John Prosser's orphans, to prevent his seizure and sale under executions outstanding against said Scott.

On the trial, evidence was offered by the defendant to sustain this last plea, which was repelled by the Court, and defendant, by his counsel, excepted.

The defendant read in evidence, a bill filed by complainants against Willis S. Scott, returnable to August Term, 1838, of Crawford Superior Court, for the recovery of the same property embraced in the present bill, which was answered on the 20th July, 1839, by Willis S. Scott, and the same defence as to the title of the boy, Harry, pleaded ; which bill was dismissed at the August Term, 1842.

Counsel for defendant requested the Court to charge the Jury, "that if the bill filed in 1838, and dismissed in 1842, was for the same property, and that more than four years had elapsed from the dismissal of said bill to the commencement of the present suit, that there was such an adverse holding on the part of Willis S. Scott, as to constitute a point from which the Statute of Limitations commenced to run, and that complainants were barred of their right of action ; which charge the Court refused to give, but did charge, "that in his opinion, the right of action did not accrue until Willis S. Scott asserted a right to the property, and gave complainants notice of the same ; and that if Mrs. Haddock was then a married woman and of

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full age, the defendant is not protected by the Statute of Limitations."

To which, counsel for defendant excepted, and upon these exceptions have assigned error.

POE & NISBET, STUBBS & LESTER and CULVERHOUSE for plaintiff in error.

HALL & HUNTER, for defendants.

By the Court.—WARNER, J. delivering the opinion.

[1.] The first assignment of error which we shall notice, is the rejection by the Court below, of the bill of sale offered by the defendant, to show that the slave, Harry, never was the property of the orphans of John Prosser, but the property of Willis S. Scott, acquired by virtue of his intermarriage with the mother of Mrs. Haddock, one of the complainants. The record shows, that Willis S. Scott was appointed guardian of John F. and Cynthia Prosser, orphan children of John Prosser, deceased, by the Court of Ordinary of Jones County, in the year 1821. In his first return made after his appointment as such guardian, a schedule of the property belonging to his wards was rendered to the Court of Ordinary, upon oath, in which the slave, Harry, is included as a portion of their property; and he continued to charge himself as their guardian, with the hire of said slave, in his returns to the Court, for ten consecutive years.

The bill of sale, offered in evidence, was made by Sally Whitworth, to Mrs. Prosser while she was a widow, and before her intermarriage with Willis S. Scott, which conveyed the boy Harry to her. Now, Scott, the administrator, says, in his answer to the bill filed by Haddock and wife (the latter of whom is one of the orphans of John Prosser) for her share of the slave, Harry, and his hire, that it is true Willis S. Scott did return the slave, Harry, to the Court of Ordinary as the property of the orphans, for the purpose, and with the design, of preventing the slave, Harry, from being seized and sold under ex-

ecutions then existing against Willis S. Scott, as his property, he having acquired a title thereto, by virtue of his intermarriage with Mrs. Prosser, to whom the slave had been previously conveyed by Sally Whitworth. The question is, could the defendant's intestate, Willis S. Scott, if now in life, be permitted to shew, as against the complainants, that the slave, Harry, was *not their property*, but *his individual property*, in the face of his *solemn admissions* to the contrary, made in his returns to the Court of Ordinary, as before stated? We are of the opinion that he could not; and consequently that his administrator is in no better condition. He would be estopped, on the ground of public policy and good faith, from repudiating his solemn acts and admissions, so repeatedly made in the course of the judicial proceedings had in the Court of Ordinary in relation to that fact. 1 *Greenleaf's Ev.* 249, §§207, 208. *Quick and Wife vs. Staines*, 1 *Bos. & Puller*, 293.

[2.] The next and main ground of error insisted on is, that the Court below refused to give to the Jury the instruction asked in regard to the Statute of Limitations, and in charging them that the complainants were not barred by the Statute. It appears from the record, that Cynthia Haddock (formerly Cynthia Prosser) was born in 1816, and was married in 1835, being under twenty-one years of age at the time of her marriage. In 1836, Haddock and his wife, Cynthia, filed a bill against Willis S. Scott, her guardian, for her share of the slave, Harry, and his hire. In July, 1839, Scott answered the bill, in which he claimed the slave as his own, and denied the right and title of the complainants thereto. The bill filed by Haddock and wife in 1836, was dismissed in August, 1842. The present bill was filed in 1848 against Willis B. Scott, the administrator of Willis S. Scott, the latter having died intestate.

The instruction asked of the Court below to the Jury, by the counsel for the administrator, assumes the position, that the Statute of Limitations commenced running in favor of the intestate, from the time of filing his answer to the first bill, in July, 1839, at which time he claimed the slave, Harry, as *his own property* and *denied* the title of his *cestui que trust*; that the

answer of the intestate, to the complainants' bill, asserted *adverse* title to the property in controversy, of which his *cestui que trust* had *knowledge*, and more than four years having elapsed from the time of such adverse holding of the property, to the time of the commencement of the present suit, the complainant's right to maintain the same, was barred by the Statute.

The instruction asked, the Court refused to give to the Jury; but instructed them "that the right of action did not accrue until Willis S. Scott asserted a right to the property, and gave complainants *notice* of the same; and that if Mrs. Haddock was then a married woman, and of full age, the defendant is not protected by the Statute of Limitations." In view of the facts of this case, there was no error in the Court below, in refusing the instructions asked, or in that which was given to the jury.

The possession by Scott of the slave, Harry, was consistent with the title of his *cestui que trust*, until July, 1839, when he repudiated the trust, and claimed to hold the property as his own, *adverse* to their title. The Statute then did not commence to run, according to the general rule, in favor of the intestate, until July, 1839, when he *repudiated the trust*. Mrs. Haddock was an infant at the time of her marriage, and continued a *feme covert*, until the *repudiation of the trust* by the trustee, in 1839.

[3.] The question has been discussed, particularly by the counsel for the plaintiff in error, whether *cumulative* disabilities, as infancy and coverture, can be tacked together, so as to operate as a bar to the Statute, until *both* disabilities shall be removed. The rule in relation to that question, we understand to be, that where there are several *co-existing* disabilities in the same person, *at the time* the right of action accrues, he or she is not required to sue, in order to avoid the operation of the Statute, until *all* are removed. If, for example, as in this case, at the time of the repudiation of the trust by Scott, the trustee, Mrs. Haddock had been an infant and a *feme covert*, the Statute would not have commenced to run against her until *both* disabilities had been removed; for the reason, that both disabilities existed *at the time the cause of action accrued*.

[4.] But if, at the time of the repudiation of the trust by

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Scott, the disability of *infancy only*, had existed, the subsequent disability of coverture could not be tacked to that of infancy, so as to prevent the operation of the Statute, until both were removed; for the reason, that at *the time the cause of action accrued*, there was only *one* disability which existed, to have prevented an immediate institution of the suit.

[5.] Disabilities which bring a person within the exceptions of the Statute, cannot be piled one upon another, so as to defeat its operation; but a party claiming the benefit of the proviso in the Statute, can only claim the benefit of the disability *existing when the right of action first accrued*. *Mercer vs. Selden*, 1 Howard's U. S. Rep. 37. *Angel on Lim.* 209, 522. *Demarest vs. Wakoop*, 3 Johns. Ch. Rep. 129. *Eager vs. The Commonwealth*, 4 Mass. Rep. 182.

[6.] In this case, however, it will be observed that it is not necessary for the complainants to tack the two disabilities together, to avoid the operation of the Statute, inasmuch as the Statute did not commence running until 1839, at which period the trustee asserted his *adverse* claim to the property. At the time of the assertion of the *adverse* claim to the property, in 1839, by the trustee, against his *cestui que trusts*, Mrs. Haddock was *twenty-one years of age*, and a *feme covert*. At the time the Statute commenced running in favor of the trustee, against his *cestui que trust*, there existed, in fact, but *one* disability, that of *coverture*. Mrs. Haddock, therefore, being a *feme covert* at the time of the accrual of the cause of action in 1839, (that being the period from which the Statute would have commenced running, according to the general rule,) she is within the *exception* which is made by the 2d section of the Act of 1806, and is protected from the operation of the Statute of Limitations. *Prince*, 577. *Flynt and Wife vs. Hatchett*, 9 Ga. Rep. 328.

The case of *Keaton vs. Greenwood*, (8 Ga. Rep. 97,) is cited by the plaintiff in error, as an authority in his favor. The general principles settled in that case, in regard to the application of the Statute of Limitations to trustees and *cestui que trusts*, we now re-affirm, as we did in *Morgan vs. Morgan*, 10 Ga. Rep. 297.

We do not, however, hold with the Court below in its charge

to the Jury, that it was incumbent on the trustee to have given notice to the *cestui que trust*, that he held and claimed the trust property, *adversely* to their title; but we maintain the doctrine asserted by the Supreme Court of the U. States, in *Yeller's Lessee vs. Eckert et al.* that the Statute does not begin to run until the possession of the trustee—before consistent with the title of the real owner—becomes *adverse, tortious and wrongful*, by the disloyal acts of the trustee, which must be *open, continued and notorious*, so as to preclude *all doubt* as to the character of the holding of the property, or the *want of knowledge* on the part of the *cestui que trusts*. 4 *Howard's Rep.* 296. According to the facts of this case, as made by the record, and the legal principles applicable thereto, the judgment of the Court below must stand affirmed.

No. 37.—JOHN P. EVANS, plaintiff in error, *vs* JOHN L. BIRGE, defendant in error.

[1.] A fact which has been directly tried, and decided by a Court of competent jurisdiction, cannot be contested again between the same parties or their privies in the same or any other Court. A judgment of a Court of Law, or a decree in Chancery, is an estoppel to the parties thereto and their privies, if it relates to the same subject-matter, and decides the question now in issue. But if that question came collaterally before the Court and was only incidentally considered, the judgment or decree is no estoppel. Whether the question now in issue was embraced in the judgment or decree, cannot be ascertained by inference, or by arguing from the judgment or decree.

[2.] *Quere:* Whether an estoppel by judgment or decree, should not in this State be specially pleaded?

Ejectment, in Bibb Superior Court. Tried before Judge STARKE, July Term, 1851.

This was an action of ejectment, brought by John P. Evans against John L. Birge, returnable to November Term, 1847, of Bibb Superior Court, for the recovery of several lots of land, near the City of Macon, constituting a part of what is known as the "Macon reserve;" among them, lots 74 and 79, the subject-matter really in dispute.

On the 16th day of December, 1848, Birge enjoined the action of ejectment by bill in Equity.

At the July Term, 1851, the action of ejectment and the bill were tried together. In the progress of the trial, Judge *Starke* dismissed the bill, on the ground that complainant had an adequate Common Law remedy.

Plaintiff in ejectment gave in evidence, the plot and grant from the State of Georgia to Samuel H. Fay, for said lots, and also a deed to himself.

The defendant in ejectment, then gave in evidence a bill in Equity, filed by the plaintiff in ejectment, in 1842, against one Alexander R. McLaughlin

This bill alleged that McLaughlin as the friend of complainant, in 1839 and 1840, advanced a large amount of money, in satisfaction of outstanding *fi. fas.* against complainant, took a transfer of said *fi. fas.* and also the notes of complainant; that said notes were renewed during the year 1840, at the end of every sixty days, at a large and usurious rate of interest; that the land known as the "Fay place" and belonging to complainant, was finally sold under and by virtue of said *fi. fas.* on the 6th day of July, 1841, when McLaughlin purchased the same at \$3100. The bill alleged that complainant had paid off the principal and legal interest advanced on said *fi. fas.* by McLaughlin, with property exclusive of the "Fay place."

By an amendment to his bill, complainant charged that the "Fay place," was again sold in January, 1842, under a mortgage *fi. fa.* in favor of Samuel H. Fay, against complainant. At this sale J. J. Gresham, Esq. became the purchaser, as the attorney of the plaintiff in *fi. fa.* with the understanding that he was to convey the same to McLaughlin.

To the bill McLaughlin filed his answer, which together with the

verdict of the Jury, and the decree of the Court on said bill and answer, was read to the Jury, which was as follows: "We the Jury find and decree that the defendant, Alexander R. McLaughlin, deliver up to the complainant all the notes he now holds against the complainant, John P. Evans, and we decree that all the executions mentioned in the bill, and which are held by McLaughlin, be entered satisfied; that the defendant McLaughlin pay \$348, on the elder *fi. fas.* now claiming the money in the Sheriff's hands, and find for the complainant Evans, \$29 77 cts. with the cost of suit to be paid by the defendant."

Plaintiff in ejectment then offered in evidence, a file of the "Macon Messenger," a paper published in the City of Macon, for the purpose of showing the illegality of the sale of lots 74 and 79, under the mortgage *fi. fa.* in favor of Fay, the same not having been advertised according to law.

Counsel for defendant objected to the evidence.

The Court sustained the objection, and repelled the evidence, on the ground "that the legal title to said land was out of Evans; that his admission in his original and amended bill against McLaughlin, and the answer of McLaughlin thereto, and the judgment of the Court upon the demurrer of John J. Gresham to said original and amended bill, and the verdict of the Jury, and the decree of the Court, on said original and amended bill, together with the *fi. fas.* showed the title out of Evans, and worked an estoppel against him, as to all of said land."

To which ruling of the Court, counsel for plaintiff in ejectment excepted.

COLE and STUBBS & LESTER, for plaintiff in error.

RUTHERFORD, BAILEY & HINES, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The question made for our consideration in this case is single, but rather difficult to come at. The plaintiff below had given in evidence certain deeds for the land in question, known

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as the *Fay Place*, amounting to some seven hundred acres, and composed of a number of fractional lots on the east branch of the Ocmulgee. The defendant, it seems, had filed a bill to aid his defence in the ejectment, to which the plaintiff, *Evans*, had answered, and which bill by consent was also on trial. The pleadings in that bill had been read to the Jury. The defendant below had also read in evidence a bill, some years ago filed by the plaintiff *Evans*, against one *A. R. McLaughlin* and one *John J. Gresham*, together with *McLaughlin's* answer thereto, a demurrer to the same filed by *Gresham* with the judgment of the Court sustaining the demurrer, and the verdict and decree rendered in the case. At this stage of the trial, the plaintiff in ejectment, *Evans*, tendered in evidence a file of the *Macon Messenger* newspaper, for the purpose of proving that a sale of the land in question under a mortgage *fi. fa.* in favor of *Fay*, and under which sale, (but not under that alone) the defendant *Birge* claimed title, was illegal, because not advertised according to law. This evidence was objected to, on the ground that the bill filed by *Evans* against *McLaughlin and Gresham*, with *McLaughlin's* answer, the demurrer to said bill filed by *Gresham*, and the judgment on that demurrer, and the verdict of the Jury, and the decree of the Court thereon, showed title out of him, *Evans*, and he was thereby estopped. The Court repelled the evidence, on the grounds taken in the objection; that is, the Court held that the record of the bill filed by *Evans* against *McLaughlin and Gresham*, showed title out of the plaintiff, *Evans*, and he was thereby estopped from asserting title to the lands. To this decision the counsel for plaintiff, *Evans*, excepted, and there submitted to a verdict. The question therefore is this, was *Evans* estopped by the proceedings had on the bill filed against *McLaughlin and Gresham*. To determine it intelligibly, a full statement of what that record contains and what judgments were rendered therein, and of the relation which these parties sustain to the parties in that cause, seems to be indispensable. Omitting a voluminous mass of irrelevant matter, it seems that *Evans* was the owner of this *Fay* tract of land, having bought it of *Mr. Howard Fay* and executed to him a mortgage for the purchase money,

a part of the purchase money for which, say \$5,000, was unpaid; that he became otherwise deeply involved, and judgments to a large amount were procured against him in favor of a *Mrs. Johnston* and divers others. Being pressed for the payment of the executions issued on these judgments, he applied to *McLaughlin* for aid, who bought the judgments, and took control of the executions, and at the same time took the notes of *Evans*, for the sums advanced by him, as collateral security, with interest, varying from the rate of forty-eight to sixty *per centum*. These notes were renewed at these rates, from time to time; and during which time, *Evans* sold to him a large amount of property, consisting of Town lots, negroes, &c. at stipulated prices (all of which is specially stated in the bill) in payment of the money thus loaned to him (*Evans*.) *McLaughlin* becoming dissatisfied with the condition of things, in 1841, caused the *Fay plantation* to be levied on by the *Johnston* and other *fi. fas.* against *Evans*, which he had bought, and it was advertised for sale, subject to the *Fay* mortgage, in July 1841. *Evans* threatening to interpose some obstacles to the sale, he and *McLaughlin* agreed that *McLaughlin* should buy the land, and give *Evans* all the benefit of a cash sale of it, which he (*Evans*) might be able to effect within twelve months, after paying to him, *McLaughlin*, the principal and legal interest of his advances, with attorney's fees. *Evans*, in his bill, insists that he was also to have possession for twelve months, which *McLaughlin* denies, but says he was only to be permitted to gather his crop. Difficulties arising between them about the possession, *Evans* attorned to *McLaughlin*. *McLaughlin* bid off the land at the sale for \$3100, and took a deed from the Sheriff, but paid no money, *Evans* remaining in possession. As to this agreement, *Evans* charges its violation by *McLaughlin*, he having caused the lands again to be levied on, by one or more of the executions which he had bought and which he had transferred to one *Moses Baldwin*, and in seeking to turn him out of his possession. *McLaughlin* in his answer, denies that he got a title to the lands by this purchase, inasmuch as he did not pay the bid of \$3100, and never got possession, and insists that he should not be held to account to *Evans* for

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that sum. An interlude in this litigious drama is this: After the sale of the lands, as stated to *McLaughlin*, they were levied on and sold as his property, under an execution against him, and were bought by one *Thomas Brown*, who sold to the defendant, *Birge*; and here let it be noticed that though *Brown*, who bought the land at Sheriff's sale, under execution against *McLaughlin*, *Birge* claims to be in privity with *McLaughlin*, and by reason of that privity, also claims the benefit of estoppel against *Evans*. But more of this hereafter. Afterwards, still the *Fay mortgage* being foreclosed, these lands were brought to sale under the mortgage *fi. fa.* *Mr. Gresham*, who was the attorney, for the mortgagees, bought them for \$5,000, and took the Sheriff's deed in his name, coming into an agreement with *McLaughlin* that he should have the land, upon his paying the purchase money. It appears that one of the lots of land embraced in the *Fay Place*, No. 79, I believe, was not named in the *rule nisi* for foreclosure, and in No. 74, I believe, was not specified in the rule absolute, or in the mortgage *fi. fa.* or in the Sheriff's deed to *Gresham*. *Gresham* sold to one *Armstrong*, he to *Thomas Brown*, and he as before stated, to the defendant *Birge*. *Gresham* was made a party to *Evans*, bill, and that bill avers the illegality of the mortgage sale. *Gresham* demurred to the bill, and the demurrer as to him was sustained, upon the grounds that the Sheriff was legally authorized to sell under the mortgage *fi. fa.* and that the complainant, *Evans*, had not tendered to him the amount of the purchase money. Possession of the premises being demanded, under the mortgage sale, this same bill was filed to enjoin it, in which the transactions already detailed are charged; in which, farther, the complainant *Evans* claims that his transactions with *McLaughlin*, be purged of all usury; that he come to a fair accounting; that he, *Evans*, has paid him more than the amount of the principal and legal interest of the money borrowed from him; that his notes to *McLaughlin* be delivered up and cancelled, and the executions against him bought by *McLaughlin* be decreed to be satisfied. In his answer, *McLaughlin* denies that he has been paid his principal and legal interest; controverts the statements in the bill as to the prices at which the property transferred to him by

Evans was to be taken; insists that that property should be charged against him at its actual value, and exhibits a balance of principal and lawful interest against *Evans* of some \$4,000. Upon the trial, the Jury decreed as follows: "We the Jury find and decree, that the defendant, *Alexander R. McLaughlin*, deliver up to the complainant all the notes he now holds against the complainant, *John P. Evans*, and we decree that all the executions mentioned in the bill, and which are held by *McLaughlin*, be entered satisfied; that the defendant, *McLaughlin*, pay \$348, on the older *fi. fas.* now claiming the money in the Sheriff's hands, and find for the complainant, *Evans*, \$29 77 cents, with the costs of suit to be paid by the defendant."

The decree of the Court was entered up in pursuance of the verdict.

The decision of the Court is founded on the admission of *Evans* in these pleadings, and judgments of the Court rendered on *Mr. Gresham's* demurrer, and the final decree rendered in the cause. From all these, he says it is manifest, that title to the lands is shown out of *Evans*, and therefore he is estopped. It is a judgment, that in Law he is estopped from asserting a claim to them, against the defendant, *Birge*. As to any admissions which the recitals in the bill contain, without referring to them in the way of specification, I remark that they are not an estoppel. As evidence against his title, they might go to the Jury for what they are worth. I do not think that there is any admission against his claim upon the lands, which, *per se*, constitutes an estoppel. In *Lampen vs. Corke*, *Holroyd, J.* says that estoppels are odious in the Law, (7 Eng. S. L. R. 209.) It is often so said, and truly said of estoppels, by recitals in deeds, admissions in pleadings, and all of that class. They are not to be readily allowed. Estoppels by judgment are, however, not odious. They are to be received with as much favor as any other defence, because it is the interest of the Commonwealth that litigation should cease. The Court clearly erred, if he is to be understood as holding that the admissions of *Evans* were in Law an estoppel. I am inclined to believe that he did not so hold, but that he referred to

the admissions, as inducement to the judgments in the cause, and that his opinion was founded on *them*.

[2.] It was insisted in the argument, that the estoppel ought to have been pleaded. Whether it ought or not, was not a point brought distinctly before the Court, and if we thought with counsel for the plaintiff in error, it would not be right to send the cause back upon a question not decided below. I will only say for myself, that although an estoppel by a previous judgment may be given in evidence under the general issue in England, and have the effect under the direction of the Court of a plea in bar, yet I am satisfied that it is more according to our Judiciary Act, and in harmony with our system, to plead it.

It is very well settled, that a fact which has been directly tried and decided by a Court of competent jurisdiction, cannot be contested again between the same parties or their privies, in the same or any other Court. A judgment therefore of a Court of Law or a decree in Chancery, is an estoppel to the parties thereto, and to those who are in privity with them. This is the rule. It is, however, carefully and strongly fenced. The judgment must relate to the same question, and must clearly decide it. If it came collaterally under consideration, or was only incidentally considered, there is no estoppel. And if the decision of the question is ascertained inferentially, by arguing from the judgment or decree and the pleadings in the case, there is equally no estoppel. Laying down the rule, with the modifications stated, I subject this case to its test. (6 *Wheat. R.* 109. 1 *Story's Rep.* 474. 4 *Howard, U. S. R.* 497, 498.)

There were two judgments in the cause, to wit: the final decree and the decision upon *Mr. Gresham's* demurrer. The bill, among other things, assailed the sale of the lands, under *Mr. Fay's mortgage*, upon the ground (which I did not before state) that the Sheriff had agreed with the defendant in execution, *Evans*, that he would sell them in parcels, but did in fact sell the whole together. The consequence was, as the bill charges, that it did not bring more than half its value. *Gresham*, as stated before, bought the land, and was made a party to the bill and demurred to it. The Court ruled that the demurrer be sustained upon two

grounds: *First*. Because there was no tender of the purchase money; and, *Second*, because the Sheriff was legally authorized to sell the land in the way he did sell it. This was a judgment in favor of the validity of the sale, and of course in favor of *Gresham's* title. The bill does not controvert the mortgage debt, or the mortgage judgment and execution at all; it only controverts the sale. The land being sold under a valid judgment, as the property of *Evans*, and bought by *Gresham*, and the sale, after being attacked in the bill, being sustained by the Court in so many words, it is a judgment in favor of *Gresham's* title, and it of course divests *Evans'* title. It is a judgment upon the title of lands, in dispute between *Evans* and *Gresham*, rendered by a Court having competent jurisdiction. The same lands being now in controversy, that judgment does estop the plaintiff in ejectment, *Evans*, from asserting a title to them against *Gresham*, and those who claiming under, are in privity with him. These things being so, the inquiry is, does *Birge*, the defendant in this ejectment, claim title under *Gresham*—is he his privity? He is, as to all the lots of land making up the *Fay Place*, except one, to wit: No. 74. *Gresham* conveyed to *Armstrong* all except that lot. *Armstrong* to *Brown*, and *Brown* to *Birge*. *Birge* therefore acquired no title from *Gresham* to that lot, and so far as that is concerned, is not in privity with him. *Evans* states, it is true, that the whole of the *Fay Place*, including thereby lot No. 74, was sold at the mortgage sale, and it is true that the judgment on the demurrer confirmed the sale; yet inasmuch as no title passed from *Gresham*, for lot 74, *Birge* cannot claim under him, and as to that, is not in privity with him. He therefore, as to that lot, is not entitled to a judgment of estoppel against *Evans*. It is argued that he is in privity with *McLaughlin*, and that *Evans* being estopped as to him, he is also estopped as to *Birge*. The privity is made out thus: *McLaughlin* bought the lands at Sheriff's sale, and it was afterwards sold under execution against him, as his property, and *Brown* became the purchaser, and *Birge* bought of *Brown*. It will be recollected that *McLaughlin* bought under an agreement with *Evans*, that he *Evans*, should be allowed to sell the land for cash, within twelve months, and have the benefit

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT CASSVILLE,
APRIL TERM, 1852.

Present—JOSEPH H. LUMPKIN, } Judges.
HIRAM WARNER. *

**No. 38.—WILLIAM DOUGHERTY, plaintiff in error, vs. MARSH
& BREERS, defendants in error.**

- [1.] All levies of chattels, real and personal, of the defendants, must be satisfactorily accounted for, before an execution will be allowed to interfere with property, bought of the debtor by a third person, and in his possession.
- [2.] It is not competent for a Justice's Court to re-open a *fi fa.* which has been entered satisfied by the sale of land, on the ground that the entry was a nullity, no title to the property having passed to the purchaser; jurisdiction was the subject-matter, being restricted exclusively, by the Constitution of the State to the Superior Courts.
- [3.] If facts are allowed to be proven to affect a purchaser with notice, it is admissible for him to inquire into all the circumstances which would shew that notwithstanding he bought with notice, still, he has a superior equity to his adversary.
- [4.] *Pl. fas.* having been entered satisfied, both by the return of the levying officer and the plaintiffs, and the credits thus endorsed, being subsequently vacated by the Court: *Held*, that lands sold by the execution debtor, to a *bona fide* purchaser, after the entry of payment and before the vacation, could not be affected by the judgment.

* NOTE.—Judge NIMMER was prevented, by severe indisposition, from attending at this Term.—REPORTER.

Dougherty vs. Marsh & Breers.

Claim, in Walker Superior Court. Tried before Judge Jno. H. LUMPKIN, October Term, 1851.

For the facts of this case, see the decision of the Court.

DOUGHERTY, for plaintiff in error.

AKIN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This is a writ of error to a claim case, tried in Walker Superior Court, October Term, 1851. It seems that sundry *fi. fas.* issuing from a Justice's Court, at the instance of Marsh & Breers, against John Mahan, and James Russell, security, were levied on lot of land, No. 213, in the 12th district and 4th section of what was originally Cherokee, but now Walker County, which was claimed by William Dougherty. On the trial, the plaintiffs tendered in evidence, the original executions, with the entries, the reading of which to the Jury, was objected to, on the ground that they are satisfied in full. There had been divers levies of real and personal property made under these *fi. fas.* A tract of land had been sold for enough to discharge them in full, principal, interest and costs; and a receipt to that effect had been indorsed by William R. Breers, one of the plaintiffs. Personal effects, too, had been seized at different times.

To rebut the entry of satisfaction by the officer and the party, the plaintiffs relied on an order passed by the Magistrates of the 71st district G. M. to which the executions were, by law, returnable, to the effect that the credit by one of the plaintiffs was a nullity, no actual payment having been made; and it was therefore ordered, that the *fi. fas.* be re-opened and proceed against the defendants, as though no such entry had been made. All the other levies were accounted for except one, by proving that they had been dismissed by the attorney of the plaintiffs, on the ground that the Constable not having given bond and security, and taken the oath of office, as prescribed by law,

was not authorized to make the levy. The levy by James Mahan, Constable, on John Mahan's interest in lot No. 217 of the 12th district and 4th section—consisting of three years' lease of the premises, together with the crops growing thereon—made the 21st day of August, 1843, was wholly undisposed of in any way.

The Court overruled all the objections to the testimony, and directed it to be submitted to the Jury, which was done, and thereupon the claimant excepted.

[1.] Holding, as we do, according to the universal practice of all the Courts throughout the State, that this last levy was sufficient to arrest the further progress of the *fi. fas.* until it was explained, our next inquiry is, was it competent for the Justices to pass the judgment which they did, re-opening the executions, after they had been discharged, both by the Sheriff and the plaintiffs?

[2.] By looking into the record, it will be discovered that the money thus receipted for, was the proceeds of a tract of land, sold as the property of one of the defendants, and purchased by the plaintiffs, or one of them; and the order of the Court was based, upon the assumption, that there being no entry upon the executions at the time of sale, of no personal property, no title passed to the purchaser. But it is clear that this Court had no jurisdiction to act in the matter. It was a question of title to real estate, the adjudication of which, is restricted exclusively, by the Constitution of the State, to the Superior Courts. To that forum alone, then, the plaintiffs must be remitted for relief, if, indeed, they be entitled to any. With a full knowledge of the condition of the executions, they direct a sale to be made of the land under them, and they themselves become the purchasers. Even if the property had been bid off by a stranger, it would be extremely questionable whether he would be entitled to have his money refunded; especially after it had, as in the present case, passed into the pockets of the plaintiffs.

[3.] The plaintiffs were permitted by the Court, in despite of the objection of the claimant, to prove that James Russell, the defendant in the executions, had, through William Dougherty, the

Dougherty vs. Marsh & Breers.

claimant, as his attorney, recovered the land which had been sold by the Sheriff, in an action of ejectment, on the ground that there was no entry of no personal property on the *fi. fas.* at the time of the levy. The claimant then offered to shew, that Russell, at the date of the levy, had personal property, to wit : horses, cattle, hogs, &c. sufficient to pay the debt; that he pointed out the property and desired the officer to levy on it, which he was prevented from doing by the plaintiff's attorney, who directed the *fi. fas.* to be levied on the land, which was done in the Town of LaFayette, without the officer's going near the premises or having made any search for personal property. To all which, the plaintiffs, by their counsel, objected, and the evidence was ruled out; to which the claimant excepted.

To rebut the equity in favor of the claimant, as an innocent purchaser, the proceedings in the action of ejectment were suffered to be introduced in evidence, by which it was intended to charge him with notice that the executions were not in fact paid, although returned satisfied. Without stopping to inquire how far the party to the execution, who bought this property, is entitled to the benefit of this equity, it would seem that it was competent to shew that he acted in fraud of the law and in bad faith, in forcing a sale of the defendant's land, when he was in possession of personal property sufficient to satisfy the judgments. Would not the purchaser be permitted to ask the aid of Chancery to restrain the plaintiffs in *fi. fa.* from disturbing his bond until the personal property in the hands of the defendants was exhausted? If so, then this testimony is admissible.

[4.] Intermediate the time when the satisfaction was entered by the creditor and the *vacation* ordered by the Court, the claimant became the purchaser of the land, and he requested the Court to instruct the Jury, that if he was a *bona fide* purchaser, that he would be protected, and that the order re-opening the *fi. fas.* would not relate back so as to override his conveyance. This charge the Court refused to give; but on the contrary, held that after the *fi. fas.* were re-opened, they found all the property which the defendants had held at the date of the

judgments, notwithstanding the same may have been transferred during the period when they were entered paid off, to a purchaser for a valuable consideration and without notice. Is this the law?

The principle involved in this question, has frequently come under review, upon applications by officers, Sheriffs and Constables, to amend their returns, and the uniform doctrine has been that the rights of third persons could not be prejudiced; much less will the party himself be permitted to amend his own entry, so as to affect the interest of innocent purchasers.

In *Howard vs. Turner and Buck vs. Hardy*, cited in *Means vs. Osgood*, (7 Greenl. Rep. 146,) the Supreme Court of Maine say: "In each of these cases we allowed such amendments to be made, but the litigation was between the original parties, and it clearly appeared that no conveyance had been made of the property, on which the amended return would operate; and that no one would be affected by such amendment, except the parties. This, we think," continues the Court, "is the extent to which we can go. To permit a material change in the return, of a fact, whereby the rights of a *bona fide* purchaser, without notice, are to be wholly defeated, would be a laxity in practice, too unsafe to be permitted."

And so we say. Third persons refer to the records, to ascertain the condition of a debtor, and find that all the judgments against him are discharged, both by the return of the proper officer, as well as by the receipt of the creditor himself, filed with the papers. The lien on the defendant's property is extinguished; and ignorant of any existing equities, he buys for a valuable consideration, what he believes to be, and what apparently is, a good title. It would be unreasonable, by any subsequent alteration of the state of the facts, that the title thus acquired in the interval should be prejudiced. This negligence, or whatever else you may call it, on the part of the plaintiffs or the officers, must not be allowed to be repaired at the expense of others.

This point was directly made and decided, in *Taylor vs. Ranney*, 4 Hill's N. York Rep. 617. *A. fi. fa.* having been returned satisfied, an entry was made on the docket, of the judgment,

Greene vs. Barnwell *et al.*

pursuant to the Statute of that State. The law here, requires it to be done on the execution docket; and the return was afterwards vacated by the order of the Court. And it was held, that the land sold by the execution debtor, to a *bona fide* purchaser, after the entry on the docket and before *vacation*, could not be affected.

"The terre-tenants," say the Court, "purchased at a time when the judgment had ceased to be a lien, and it would be a great hardship upon them to give such a retroactive effect to the amendment which the Sheriff was afterwards permitted to make in his return, as would overreach and defeat their title. It was the fault of the plaintiff, that the original return was wrong. They ought to bear the burden instead of casting it off upon *bona fide* purchasers. If the Sheriff was guilty of misconduct, the plaintiffs may have an action against him; and it is much more reasonable to confine them to that remedy, than it would be to allow them to visit the fault upon innocent third persons.

A different decision, we are satisfied, would be productive of great mischief. And we do not find a case where an amendment of this sort, whether of the act of the officers, or of the party, or both, will be allowed to operate so as to defeat the rights of third persons. In every conflict between litigants, under such circumstances, the Courts have always restrained the tenant's title, derived from the judgment debtor.

Let the judgment be reversed.

No. 39.—JAMES W. GREENE, plaintiff in error, *vs.* THOMAS B. BARNWELL *et al.* defendants in error.

[1.] Where a draw had been given in, for Wesley Yarborough's orphans, under the Land Lottery Act of this State, and a grant had issued to them in that capacity: *Held*, that it was competent to show by parol evidence, the *identity* of the persons mentioned in the grant, and that they were *ille-*

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gitimate, for the purpose of shewing that their illegitimate half-brother was their heir at law, under the Act of 1816.

[2.] The question of *identity* is a question of fact, to be submitted to the Jury, and when there is any evidence of that fact, a non-suit will not be awarded.

Ejectment, in Gordon Superior Court. Tried before Judge Lavin, March Term, 1852.

The facts of this case are as follows :

The plaintiff in error brought his action to recover a lot of land in possession of defendant. On the trial, plaintiff introduced a grant from the State to Wesley Yarborough's orphans, issued under the Lottery Acts of 1830 and 1831, covering the land in dispute.

Witnesses were then introduced by plaintiff, who testified that a draw was given in under the Lottery Acts, for Wesley Yarborough's orphans, who were the illegitimate children of Wesley Yarborough, in the district set forth in the grant as the residence of the grantees; that the said children both died under age and without issue; that the plaintiff is a half-brother of the children known as Wesley Yarborough's orphans, and is himself an illegitimate; and the only brother of said orphans.

On hearing the plaintiff's testimony, the Court, on motion and argument, awarded a non-suit, on the ground—

1st. That sufficient proof had not been adduced of the identity of the drawers of the lot.

2d. That no proof was made, that there were no other persons in the district, known as Wesley Yarborough's orphans.

3d. That the grant being issued to orphans, could not convey title to illegitimates.

To which decision of the Court, plaintiff in error excepted.

MCDONALD, for plaintiff in error.

UNDERWOOD, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] This action was instituted in the Court below, to recover the possession of the tract of land in controversy, by James W. Greene, who is the lessor of the plaintiff, and who claims the land, as the heir at law of Wesley Yarborough's orphans, who are the grantees from the State. On the trial of the cause, the plaintiff read in evidence the grant from the State, to Wesley Yarborough's orphans, to the lot of land in controversy, and then offered the evidence of witnesses, who testified that a draw was given in by their next friend, for Wesley Yarborough's orphans, and that the persons known as Wesley Yarborough's orphans, were *illegitimate*, and that the lessor of the plaintiff was also an illegitimate, and half-brother to the orphans of Wesley Yarborough, who were both dead.

[2.] The Court below non-suited the plaintiff, and the question is, did the plaintiff make out a *prima facie* case, which in Law, entitled him to recover the premises in dispute? The grantees took the land under the grant from the State, as *purchasers*, and were seized thereof, in that capacity, at the time of their death. It is true that, according to the Land Lottery Act, under which the land was drawn, illegitimates were not entitled to a draw, but orphans were entitled; in other words, the draw was *fraudulent*, and had it been returned as a fraudulent draw, in the manner and within the time prescribed by the Land Lottery Act, would have been condemned as such, and the title thereto held under the grant, would have been forfeited to the State. But the time within which lots of land *fraudulently* drawn in the land lottery, were to have been returned as such, has long since expired by the limitation contained in the Land Lottery Act. The fraud in giving in for the draw, was a matter between the State and the drawers of the lot in question, and she has not thought proper to institute any proceedings to vacate the grant, within the time prescribed by the Act. The grantees, under the name of Wesley Yarborough's orphans, died, *seized in law* of the lot of land mentioned in the record. Who were the persons that

drew the lot of land, by the name of Wesley Yarborough's orphans? The evidence was offered to *identify the persons who drew the lot of land*, not to *contradict the grant*, as has been contended, and in our judgment, was properly admitted for that purpose. 3 *Starkie's Ev.* 1021, 1022. It has been insisted, that this case comes within the principle settled in the case of *Sykes vs. McRory*, 10 *Georgia Rep.* 465. Here, there was no *mistake* in issuing the grant; the grant issued to *the persons* for whom the draw was given in. In that case, the evidence offered was to show that the grant issued to *Rachel McCrary*, was intended for *Rachel McRory*, thereby substituting a *different name* for the grantee to that specified in the grant. By the Act of 1816, illegitimates are authorized to inherit from each other. *Cobb's New Digest*, 293. The evidence offered upon the trial, shewed that *the persons* who drew the lot of land in question, under the name of Wesley Yarborough's orphans, were *illegitimate*; that they were dead; that the lessor of the plaintiff was their half-brother, and also an *illegitimate*, and according to the Act of 1816, is entitled to inherit from them. The plaintiff, in our judgment, made out a *prima facie* case, to entitle him to recover, which ought to have been submitted to the Jury. Whether the evidence of the *identity* of the drawers, or of the plaintiff as their heir at law, was sufficient to authorize a recovery, was a question for the Jury, and not for the Court, to decide; there is undoubtedly *some evidence of identity* contained in this record, which ought to have been submitted to the Jury, for their consideration.

Let the judgment of the Court below, awarding the non-suit, be reversed.

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No. 40.—GEORGE W. TOWNS, Governor, &c. for the use of J. S. & L. BONCE, plaintiffs in error, *vs.* WILLIAM KELLETT *et al.* defendants in error.

- [1.] The bare circumstance that the name of a person who did not execute the bond, is inserted in the body of it as one of the obligors, and a seal is left for his name, is not, *of itself*, evidence to show that those who did sign and seal and deliver it, delivered it only as an *escrow*, upon condition that that person should also execute it.
- [2.] It is error in the Court to charge the law, upon an assumed state of facts, which have not been proven.
- [3.] It is error in the Court to restrict the consideration of the Jury, in its charge, to a portion of the testimony only; and to instruct them that they must find for the plaintiff or the defendant, accordingly as they may find that to be.
- [4.] Will a Justice of the Inferior Court, who has certified by his official attestation, that a Sheriff's bond has been sealed *and delivered*, be allowed to deny that the bond was, in fact, delivered? *Quere.*
- [5.] Although a Sheriff's bond be originally delivered as an *escrow*, yet, if subsequently, the sureties suffer him to act under this bond, will it not authorize the inference, that they had waived their demand of additional sureties and had consented to be bound by it as it stood? And would not a contrary doctrine be to sanction a fraud upon the public? *Quere.*

Debt, in Chattooga Superior Court. Tried before Judge JNO. H. LUMPKIN, October Term, 1851.

For the facts of this case, see the decision of the Court.

ALEXANDER, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of debt brought in Chattooga Superior Court, on a Sheriff's bond, at the instance of the Governor of the State, for the use of J. S. & L. Bonce, against William Kellett, as principal, and Martin Kellett, John W. Neely, Andrew Mosteller, John P. Evans and James F. Hitchcock, as securities.

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William Kellett and James F. Hitchcock were not served. At the trial, the plaintiff tendered in evidence, the order of the Court, authorizing the bond to be delivered to him for the purpose of bringing the action. He then offered the bond itself, which was signed and sealed by all the defendants against whom the suit was brought, and purported to have been delivered in the presence of John F. Beavors and Terry F. Bolling, two of the Justices of the Inferior Court. The following entry was indorsed upon the bond: "Registered on the minutes of the Court, April Term, 1843. L. L. HOPKINS, Clerk."

The name of Thomas S. Latimer was inserted in the body of the instrument, immediately after the names of William and Martin Kellett, and a blank seal was placed at the end of the signatures of the other securities.

[1.] Counsel for the defendant objected to the reading of the paper, on the ground that the name of Latimer appearing in the body of the bond and a scrawl having been placed at the bottom, to which there was no name, was evidence that the other securities were not to be bound unless Latimer subscribed also; and that he having failed or refused to do so, the obligation was imperfect and not binding on those who did sign; and the Court decided, that the instrument itself, afforded *prima facie* proof that it was inchoate; and that the securities who did sign were not to be liable, unless Latimer also signed; and that unless the plaintiff could rebut this presumption by evidence, the testimony must be excluded; whereupon, counsel for the plaintiff excepted.

In the judgment of the Court, the name of Latimer being inserted in the body of the writing and a seal left for his name before the defendants executed it, is no evidence, *per se*, that the defendants did execute it *on condition* that he, Latimer, should also execute it. It is found in the possession of the obligee; it purports to have been sealed and delivered in the presence of two of the Justices of the Inferior Court, the agents appointed by the law to take the bond; and it was registered on the minutes of the Court. We must therefore say, that there was no evidence to justify the Court in excluding the paper. *Phil. on Ev.* 364.

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Grellier vs. Neale, Peake's Cases, 145. *Burrows vs. Lock*, 10 Ves. 474.

In *Blume vs. Burrows*, (2 *Iredell's L. Rep.* 338,) the name of James Martin, one of the securities, was inserted in the body of the bond, but was not prefixed to one of the seals left for that purpose; and the exception was taken there as here, and sustained by the Circuit Judge, that the instrument was not the act and deed of the parties who were sued, as it was inchoate and never delivered, which was manifested by Martin's having failed to sign the bond as an obligor; and the Jury having returned a verdict for the defendants, and a new trial being refused, the plaintiff appealed to the Supreme Court, which held, and we think very properly, that the proof tendered, amounted in law, to a presumption of an absolute sealing and delivery by the defendants, and that the burthen of proof was thrown on the defendants, to shew that the sealed writing had been delivered as an *escrow*.

In *Elliot & Perkins vs. Mayfield and Wife*, (4 *Ala. Rep.* 417,) the name of John Cummings was inserted in the body of the bond, but it was executed by Thomas Cummings; and the objection was, that the bond was void or inchoate on that account. The Court say, "it is true, that if the plaintiffs in error executed the instrument as an *escrow*, to be bound only on condition that it was executed by John Cummings, and Thomas Cummings had been afterwards substituted without their consent, it would not be their bond. But for aught this Court can know, the plaintiffs in error may have executed the bond, unconditionally, and not as an *escrow*, or may have subsequently assented to the substitution of Thomas for John Cummings."

None of the cases cited on the brief of the defendant's counsel counteract the doctrine established by these cases. I have examined carefully and critically all the authorities which are supposed to be in conflict with it, in the adjudications which have been made upon this point. Not one of them overthrows this position.

The first is *Bean vs. Pailer & French*, 17 *Mass. Rep.* 591. This was a *scire facias*, to charge the sureties upon a bail bond.

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Upon oyer of the bond, it appeared to have been executed only by Pailler and French, the sureties, and not by Aiken, the principal debtor, although in the body of it, it purported to have been executed by the three, and a seal was affixed, with a space opposite to it, for Aiken's signature. The Court held, that the objection to the bond was fatal, for the reason *that it was essential to a bail bond that the party arrested should be the principal*; that the declaration recited that he had been arrested and had executed the bond, and that the instrument was incomplete without his signature. And the grounds of this opinion seem to be satisfactory—indeed, I might say unanswerable.

In the subsequent case of *Wood vs. Washburn*, (2 Pick. Rep. 24,) it was held, upon the authority of *Bean vs. Pailler and French*, that where an administration bond was not executed by the administrator, the sureties were not liable.

But the objection now under consideration, is not that William Kellett, the principal, did not execute the bond. If so, these precedents would apply.

The next case which I find, is *Mary Tindal, administratrix of James Tindal, vs. Henry Bright*, (*Monroe's Rep.* 103.) The defendants pleaded *non est factum*, specially accompanied with an affidavit of its truth, as required by the Statute of Alabama and by the Judiciary Act of this State, *although none such was filed on the trial in the Court below*. The oath appended to the plea, alleged that the instrument on which the action was brought, was signed under the express condition and understanding between the obligee and the party, that it was to be considered valid, and as his act and deed, *only* in the event that George Buchanan should execute the same as a co-obligor or co-security; otherwise, the same was to be considered as a nullity, and returned to the defendant to be destroyed, which event did not happen; whereupon the writing is not his deed. Upon demurrer, the plea was held to be sufficient; and such, it unquestionably was, according to the opinion of this Court, in *Crawford vs. Foster*, 6 Ga. Rep. 202.

Again: in *King vs. Smith and others*, and *Porterfield vs. The Same*, (2 Leigh's Rep. 157,) P. agreed to join H. W. as his

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surety, in a forthcoming bond; and executed and delivered the bond as an *escrow*, upon condition that K. should also join in and execute the bond as co-surety; and K. agreed to join as surety in the bond, and executed and delivered the same as an *escrow*, upon condition that O. W. also, should join in and execute the bond as co-security; but O. W. never united in the bond. It was held, that upon this state of facts, neither P. nor K. are liable for any part of the debt, in *Equity*, any more than they would be liable for any part of it *at Law*, where the facts would amount to proof of *non est factum*.

If, upon a special plea of *non est factum*, the Jury find the facts as here stated, we are clear that the Court of Appeals was right in maintaining that the bonds in question were not the deeds of the parties.

Sharp vs. The United States, (4 *Watts*, 21,) is a case which, from the head-note, as transferred from the original Report to the Digests, seems most to favor the judgment that is under review. It is laid down that a bond taken in pursuance of the Act of Congress, of the 19th day of April, 1816, signed by one surety, and which contained in the body of it the names of two, is not recoverable against the one who signed it, unless it be proved that he who signed it, dispensed with the execution of it by the other.

But by reference to the opinion of the Court, as delivered by Mr. Justice *Rogers*, it will be found, that the decision is placed expressly upon the peculiar provisions of the Law, which makes it the duty of the Collector of the Revenue to take a bond from the proprietors of stills, *with two or more sureties*. He says, "the bond, at the time Alexander Sharp affixed his signature to it, was filled up with the names of the principal and William Laughlin, and contained a reference to the Act of Congress, which requires, as before remarked, a bond with two or more sureties. At the time, therefore, that Alexander Sharp signed the bond, he had a right to believe that it was the intention of all the parties, that the bond was to be taken in strict conformity with the Act of Congress; and that William Laughlin would also execute the bond."

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Without intending to indorse the correctness of the conclusion at which the Court arrived, it is quite obvious that there is nothing in this Pennsylvania case, to justify the Judge below, in holding, that upon the face of the bond, and in the absence of any other proof, it was void as to the present defendants.

John S. Beavers was then introduced and sworn as a witness by the plaintiff. He testified that he was one of the Inferior Court of Chattooga County; that his attestation to the bond was genuine; that the name of Thomas S. Latimer was inserted by him in the body of the bond, at the suggestion of William Kellett, the principal; that the bond was then delivered to Kellett, to procure the signatures of the persons he said would go his security; that there were not more than two of the securities present at any one time when they signed the bond; *that there was no understanding between him, as Judge, and the securities, that they were not to be bound unless Latimer signed—there was nothing said on the subject*; that he understood that Latimer was to sign, and would not have agreed to take the bond unless Latimer, or somebody else as good, had signed it; the security, he stated, was not very good at best; he did not know how the bond found its way into the Clerk's office; Kellett acted, for two years, as Sheriff of Chattooga County; Latimer did not authorize or direct his name to be inserted in the bond; witness never had any conversation with Latimer in reference to it.

The bond was then read to the Jury; and the *fi. fas.* which had been placed in the hands of the Sheriff in favor of the Bowies, the uses of the plaintiff, with the officer's receipt indorsed thereon for the money; also, the rules absolute, passed by the Court, requiring the Sheriff to pay over the amount due on the executions.

The testimony being closed, the Court charged the Jury as follows:

"In this case, there are but two points of law that it is necessary that I should refer to your consideration, before you retire to your room: Are the securities to this bond released from liability to the obligee, if representations were made that other responsible individuals would sign it with them, who afterwards

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failed or refused to do so? The Court is clear, that if such representations were made, and the securities were influenced by them to sign the bond, then it was an inducement to the contract; and if the other securities did not sign it, then those who did, are released from all liability.

“But again: was the bond executed and delivered? If you shall be of the opinion, from the testimony, that the bond was imperfect and inchoate, and left with the Sheriff, the principal obligor, for the purpose of obtaining the signature of Thomas S. Latimer, who never afterwards signed the bond, then it was never executed and could not be delivered until it was executed, and there is no liability incurred by the securities who did sign.

“It is improper that the Court should intimate, by any expression, what has or has not been proved on this point. It is your exclusive right to say what facts have been proved. The only witness who has testified, was introduced by the plaintiff in the action. He was one of the Judges of the Inferior Court, whose duty it was made by law, to take and approve the bond of the Sheriff of this County. Did the testimony satisfy you that the bond was executed and delivered? If so, you will say so by your verdict, and find for the plaintiff; but if his testimony should satisfy you that the bond was imperfect and inchoate and remains in that condition to this day, so far as the Court and the rest of the securities are concerned, then you will be compelled to find for the defendants.

“If there was an understanding that Thomas S. Latimer should sign the bond, between the Court and the securities; and the Court gave the bond to Kellett, to carry out that understanding, and he failed to obtain his signature, then the omission leaves the bond imperfect, and until that signature is obtained, after this agreement and understanding is had, there is no liability on the part of the securities—there is no executed contract between the parties.”

[2.] This charge was excepted to; and in the opinion of this Court, it is objectionable on several grounds. There was not a scintilla of evidence in the case, going to shew any understanding between the members of the Court who superintended

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the execution of the bond, *and the securities*, that Latimer was to sign the bond. On the contrary, Beavers, the only witness sworn in reference to this point, states most positively that there was no such understanding. For any thing that appears to the contrary, they signed and sealed it, not upon condition that Latimer should do so likewise, but each for himself, as his own distinct and independent act and deed. Neither was there any *implied* understanding, as in the Pennsylvania case, inasmuch as our law does not prescribe, as did the Act of Congress, the number of securities which should sign the bond. There is no cause to complain, therefore, that the reasonable expectations of those who did sign, were disappointed, either wilfully or negligently. There was no intimation on the part of any one or more of them, that they were willing to bind themselves jointly with Thomas S. Latimer or any body else, and that they were unwilling, without this co-operation, to make themselves alone responsible.

According to the ruling of this Court, therefore, in *Butt vs. Maddox*, 7 Ga. Rep. 495; *Bethune vs. McCrary*, 8 Ga. Rep. 114; and *Montgomery vs. Evans*, *Ib.* 178, it was error to instruct the Jury upon an assumption of facts which did not exist.

[3.] The charge is justly obnoxious to the further complaint, that upon the question of *delivery*, it restricted the consideration of the Jury, exclusively to the testimony of Beavers; whereas, independently of that, there was sufficient proof upon this point, to have justified them in finding a verdict for the plaintiff. The bond was registered on the minutes of the Court—taken from office designated by law for its custody, and purports upon its face to have been sealed and delivered in the presence of two of the Justices of the Inferior Court, the agents appointed by law to take it.

[4.] Whether Beavers and his colleague, after certifying officially that the bond was sealed and delivered in their presence, shall now be permitted to contradict the fact?

[5.] And whether—although the bond was originally delivered as an *escrow*, yet if subsequently the securities suffered

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their principal to act as Sheriff under it—it would not authorize the inference that they had waived their demand of additional sureties, if any such they were made, and consented to be bound by the bond as it stood? And whether it would not be a fraud upon the public, to allow them to lie by for two years, and suffer Kellett to act, without objection, upon a bond which they had signed, and the condition of which, therefore, it was their duty to examine into? These are all important questions which it may become necessary to weigh well, in the further progress of this cause.

The errors complained of in the requests and refusals to charge, as well as the instructions given, are all embraced in the assignments already discussed and adjudicated.

Let a new trial be awarded.

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No. 41.—FRANCIS J. SULLIVAN and THOMAS S. PRICE, Sheriff, plaintiffs in error, vs. JACOB HEARNDEN, defendant in error.

- [1.] If the defendant makes an affidavit of illegality, which is insufficient in law to arrest the *ft. fa.* the Sheriff is justified in disregarding it, and proceeding with the sale of the property.
- [2.] If the Sheriff has authority to sell property, a failure in the performance of any part of his duty, and for which he would be compelled to indemnify the owner to the extent of the injury received, would not destroy the title of an innocent purchaser.
- [3.] The illegal dispossession of the tenant, by the Sheriff, under a sale made by him, is a *mere trespass*, which can be adequately compensated at Law, and to restrain which, an injunction will not be granted.

In Equity, in Floyd Superior Court. Decision by Judge JOHN H. LUMPKIN, at Chambers.

For the facts of this case, see the decision of the Court.

ALEXANDER, for plaintiffs in error.

UNDERWOOD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

An execution, issuing out of Floyd Superior Court, in favor of William J. Cantrell, against Jacob Hearnden, was levied upon two Town lots, Nos. 4 and 21, in the Etowah division of the City of Rome, as the property of the defendant. Before the day of sale, Hearnden, the defendant, made oath, in writing, that the *feri facias* was proceeding illegally against him, upon the ground, that the property levied on, was then in the custody of the law, having been previously seized as the property of one James M. Hearnden, and claimed by the affiant or some other person.

The Sheriff, disregarding the affidavit as insufficient, proceeded to sell the property, which was bid off by Francis J. Sullivan. Jacob Hearnden then filed his bill in Chancery, setting forth these facts, and praying for an injunction to restrain the purchaser and Sheriff from dispossessing him, which was granted.

The answers of the defendant were filed, denying, fully, all the equity in the bill. Sullivan swore that he had not the slightest notice or intimation that any attempt had been made to stop the sale until several days after he bought; and Price, the Sheriff, deposed, that deeming the affidavit wholly insufficient to suspend the sale, he notified the defendant that he should sell the property unless the money was paid.

A motion was made at Chambers to dissolve the injunction, which was refused by the Chancellor.

Ought the injunction to have been continued? We think not, most clearly: 1st. Because the ground taken by the defendant to stop the sale was totally insufficient, and consequently he has no equity. The affidavit states, that the lots before that time, had been levied on as the property of James M. Hearn-

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den, and claimed and was then in litigation. Grant it. It was the duty of James M. Hearnden, or his creditors, or the claimant, to interfere, and not Jacob Hearnden, as whose property it was now selling. If he was the claimant, and such is disclosed to be the fact, by the answer to the bill, then the property belonged to him, and was liable to seizure and sale, for his debts, or else he was guilty of perjury in claiming it, on oath, as his.

[1.] The Sheriff rejects an affidavit of illegality, duly tendered him, at his peril; but if the law sanctions his judgment, as to its sufficiency, the proceeding will be legal and the Sheriff justified.

[2.] But concede that the ground taken was insufficient to have arrested the sale, will the misconduct of the officer invalidate the title of a *bona fide* purchaser? We apprehend not.

It was well said by Judge *Ruffin*, in *Mordecai vs. Speight*, (3 Dev. L. Rep. 428,) that to require bidders to see that the Sheriff had complied with all his duties, "would be dangerous to purchasers and ruinous to defendants in execution." The Sheriff derives his authority to sell from the *feri facias*; and whether, in conducting the sale, he discharges his obligations to third persons, is wholly immaterial to the fair and honest purchaser. If the Sheriff is guilty of official delinquency, he and his sureties are responsible to the party aggrieved.

[3.] But suppose we were wrong upon both of these points; still the injunction must be dissolved. This Court has twice decided that the injury here threatened, that is, for the Sheriff to dispossess the occupant of land illegally, and place the purchaser at his sale in possession, is a mere trespass, susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law; and that therefore an injunction will not be granted, or if sanctioned will not be retained. *Anthony vs. Brooks*, 5 Ga. Rep. 576. *Bethune vs. Wilkes & Rutherford*, 8 Ga. Rep. 118.

In the latter case, the bill alleged, that the tenants, the *cestui que trust* of the complainant, would become homeless and houseless, for want of means to procure another habitation. But the

response of the Court was, that this would only aggravate the trespass, and enhance the measure of damages.

The judgment below must be reversed.

No. 42.—JOHN NEAL, plaintiff in error, vs. THOMAS S. PRICE, Sheriff, defendant in error.

[1.] Where a Sheriff had made a levy on the property of a defendant in execution, and neglected to advertise, and sell the same for nearly six months, not having time to do so, before the next term of the Court, and just before the sitting of the Court, the defendant obtained an injunction restraining the plaintiff from collecting his *fi. fa.*: *Held*, that the Sheriff by his negligence, in failing to collect the money, was liable therefor, and could not protect himself for such negligence, by alleging the granting of the injunction, as an excuse for not having raised it.

Rule, in Floyd Superior Court. Decided by Judge JOHN H. LUMPKIN, February Term, 1852.

This was a rule against the Sheriff, calling on him to show cause, why he should not pay the amount due on a *fi. fa.* of plaintiff in error, which had been in his hands a sufficient time to have made the money.

The Sheriff, for cause, showed that on the 15th July, 1851, he had levied the *fi. fa.* on a negro man, the property of one of the defendants in *fi. fa.* which property he had not sold, because he said that shortly after the levy, the defendant's attorney had applied to him for the *fi. fa.* and obtained it for the purpose of annexing a copy to a bill of injunction to restrain proceedings on said *fi. fa.*; that defendant's attorney retained the *fi. fa.* in his hands (excepting about ten days that plaintiff's attorney took it, for the purpose of claiming money in another County) until a bill of injunction to restrain the plaintiff from proceeding with it, had been sanctioned by the Judge, on the 14th day of Jan-

uary, 1852. On hearing this showing, the Court held the same to be sufficient, and refused to grant a rule absolute. To which decision the plaintiff in *fi. fa.* excepted.

PRINTUP, for plaintiff in error.

ALEXANDER & AKIN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

Was the showing made by the Sheriff, contained in this record, sufficient in Law, to discharge him from liability to pay the plaintiff's demand? According to the rule established by this Court, in *Crawford vs. Word et al.* 7 Geo. Rep. 445, the Sheriff must be held to have acted negligently, and in default of his duty to the plaintiff in execution. What are the facts of this case?

[1.] The execution, was placed in the hands of the Sheriff, and he levied it on the defendant's property, on the 15th day of July, 1851. From the 15th day of July, 1851, until the 14th day of January, 1852, (the day the injunction was sanctioned) he failed and neglected to raise the money, a period of six months, lacking one day. During this time, the plaintiff's attorney had the execution in his possession only about ten days, for the purpose of claiming money in another County. The Sheriff states, that the defendant's attorney had the execution in his possession, for the purpose of filing the injunction. If the Sheriff thought proper to deliver the possession of the execution over to the defendant, or his attorney, he did so at his own risk, and upon his own responsibility; that circumstance will not exonerate him from liability to the plaintiff, who did not place the execution in his hands for any such purpose, but for quite a different purpose.

By neglecting to sell the defendant's property for nearly six months after making the levy thereon, he would not have been able to have had the money, at the next term of the Court, had not the time of the sitting of the Court been altered; nor would

he have had time to have raised the money, by sale of the property, in time for the Court, as altered by the Legislature. Here then is a clear and admitted neglect of duty on the part of the Sheriff to raise the money by a sale of the defendant's property, for nearly six months, whereby he had put it out of his power to raise it in time for the next term of the Court. But it is contended that notwithstanding this neglect of duty on the part of the Sheriff to raise the money in time for the next Court, the sanctioning the injunction, just before the sitting of the Court, will exonerate the Sheriff from liability. We cannot sanction such a principle, in regard to the official duty of Sheriffs. It was the right of the plaintiff in execution, to have had his money made by the Sheriff, during the time the execution was in his hands, by levy and sale of the defendant's property, and it was the duty of the Sheriff under the law so to have made it. The Sheriff by neglecting to perform his official duty, had already become legally liable to the plaintiff for the amount of his execution, before the injunction was sanctioned; and to enable him to protect himself under that proceeding, would be in effect, holding out an inducement to Sheriffs to collude with defendants against the judgment creditor; for after neglecting to perform his official duty, by raising the money, it then becomes *his interest*, that the defendant in execution should defeat his creditor's demand, in order that the Sheriff may be excused from all liability on his part. When an execution is placed in the hands of the Sheriff, the law makes it his duty to proceed with all reasonable diligence, to raise the money by levy and sale, of the defendant's property, in the manner which the law prescribes; and if he thinks proper to indulge the defendant, or to turn over the execution to him, or his counsel, he acts upon his own responsibility, but cannot thereby defeat the rights of the judgment creditor. It has been said on the argument, that in general, this Sheriff is a most vigilant and faithful officer, in the discharge of his official duties. This fact, we have no right to question, but we have no dispensing power, to exonerate him from the operation of the general rule, which we adopted in *Crawford vs. Word et al.* in regard to the legal liability of

Prior *vs.* Gentry.

Sheriffs. Public policy, as well as the interest of the officer, forbids that we should relax the rule as asserted in that case. The general rule must be made to operate equally upon the good, as well as the negligent officer, whenever their general acts or omissions, shall bring them within it. The settled rule of this Court in regard to Sheriffs, is, that it will always protect them in the faithful discharge of their official duties, to the full extent of the legal authority with which it is clothed, but hold them to a rigid accountability, for the prompt and honest discharge of all those duties which the law devolves upon them; for it is in vain for Courts of justice to award judgments, if the Sheriffs of the respective Counties shall fail, or neglect to execute them, whenever the due and legal process for that purpose shall be placed in their hands.

Let the judgment of the Court below, discharging the rule against the Sheriff, be reversed.

No. 43.—ASA PRIOR, plaintiff in error, *vs.* PETER GENTRY, defendant in error.

[1.] An indorser of a promissory note, where the maker resides out of the State, is not discharged, if the creditor, on request, neglects to proceed against the *principals* until the note is barred, as to them, by the Statute of Limitations; there being no offer of indemnity to the holder against the consequences of risk, delay or expense.

Assumpsit, in Paulding Superior Court. Tried before Judge Jno. H. LUMPKIN, November Term, 1851.

The facts of this cause are fully set out in the opinion of the Court.

UNDERWOOD, for plaintiff in error.

W. AIKEN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This was an action of assumpsit, brought in Paulding Superior Court, by John Gentry, for the use of Asa B. Mann, administrator, *de bonis non*, of Stephen H. Mann, deceased, against Asa Prior, on a note given by Samuel Grant and Henry F. Boreland, to the defendant, for one hundred and fifty dollars, dated the 24th of March, 1837, and due the 25th day of December next thereafter, and indorsed to Peter Gentry, by the defendant, on the 13th day of October, 1841. The special defence set up, was that the plaintiff had failed to sue the makers of the note, after request made to that effect, until it was barred as to them, by the Statute of Limitations.

The testimony showed that immediately after the indorsement was made, Prior said to Gentry, “when you go to Kentucky, I desire you to see the makers of the note, as I have received a letter from them, stating that the money due thereon is ready; and if they do not pay, I wish you to sue them immediately.” To which, says the witness, the indorser made no reply. It appears from the evidence that Grant and Boreland lived at the time in the State of Kentucky, and from aught that was proven to the contrary, continued to reside there ever since.

Does the neglect of the holder to sue the makers, under these circumstances, exonerate the indorser? We think not. See *Howard vs. Brown*, 3 *Kelly's R.* 524.

This Court there held, that where notice was given to the holder of a note, to sue under the Act of 1831, and before the expiration of the three months allowed by law, for that purpose, the maker removed beyond the jurisdiction of the Court so that he could not be sued, it was at the risk of the security or indorser, and not of the holder. In other words, that the holder was thereby released from the obligation to sue the principal, imposed by the Statute.

A fortiori, is he relieved from this duty, where the maker

never was within the limits of the State, and where, consequently, he never could have been sued?

But it is contended, that upon the principles of the law regulating the relation of principal and surety, that the holder having waited until the makers were protected by the six years bar, and that, too, after a request to sue had been made, that he has lost his remedy against the indorser.

And we admit that there is respectable authority to be found, in support of the proposition, that where the holder of a note is requested by the *surety*, (not the *indorser*, whose undertaking is in the nature of a new and distinct contract,) to proceed without delay to collect the money out of the principal, who is at the time *solvent*, and he neglects to do so until the maker becomes *bankrupt*, that the *surety* will be discharged. *Prior vs. Packard*, 13 Johns. R. 174. *Bruce vs. Edwards*, 1 Stewart's R. 11.

Suppose we were to concede this doctrine; it is accompanied with a qualification which would make it wholly unavailable to the defendant in the present case. *There must be an offer of indemnity to the holder against the consequences of risk, delay and expense.* *Wright vs. Simpson*, 6 Ves. 734. In the matter of *McKinley*, 1 Johns. Cas. 138. *Clason vs. Morris*, 10 Johns. R. 539. *Ingalls vs. Dennett*, 6 Greenl. 79. *Crane vs. Newell*, 2 Pick. (2d ed.) 614, n. 1. *Beardsley vs. Warner*, 6 Wend. 610. *Warner vs. Beardsley*, 8 Wend. 199. *Manchester Iron Manuf. Co. vs. Sweeting*, 10 Wend. 162. *Huffman vs. Hulbert*, 13 Wend. 376, 377. *Frye vs. Barker*, 4 Pick. 382. *Davis vs. Huggins*, 3 N. Hamp. R. 231. *Croughton vs. Dewal*, 3 Call. 69. *Moore vs. Breussard*, 20 Martin's (Louis.) R. 277.

Apart from our Statute, there is already a remedy for the surety, and one which we cannot admit, "lays on him a burthen too hard to be borne." Let him pay the debt according to his undertaking, and sue the principal himself; or resort to equity and prosecute the suit in the name of the creditor, but at his risk and cost. (See authorities as cited above.)

This is an old rule, and we think that any other would be unnecessary and inexpedient. I am not ignorant that the law looks

favorably on the situation of securities, and extends to them every assistance to enforce the payment of the debt by the principal. But perhaps both the legislation of the country, as well as the decisions of the Courts, have gone quite far enough to protect this class; unless, indeed, the object be to destroy entirely the relation of principal and surety, against which I have nothing to say.

Judgment affirmed.

No. 44.—GEORGE W. HOWELL, plaintiff in error, *vs.* JOHN S. BURNETT, defendant in error.

[1.] Where the maker of a promissory note was a non-resident at the time of its execution, but returned to the State *after its maturity*, so that he could have been sued thereon: *Held*, that the Statute of Limitations commenced to run against the holder of the note, from the time of the return of the maker thereof into this State after it became due, so that a suit could have been instituted against him thereon.

Action on note, in Floyd Superior Court. Tried before Judge LUMPKIN, February Term, 1852.

George W. Howell brought his action against John S. Burnett, on a promissory note. On the trial of which, at February Term, 1852, defendant tendered in evidence, under a plea of set-off, a note made by the plaintiff, to S. E. Burnett or bearer, dated August 26th, 1842. To the introduction of this note, plaintiff objected, on the ground that it was barred by the Statute of Limitations.

To meet this objection, defendant introduced as a witness, S. E. Burnett, the original payee, who proved that the note was given in Summerville, Ga.; that plaintiff was then, and has been ever since, a resident of Cherokee County, Alabama; and

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that he, witness, knew he resided in Alabama when he took the note. The witness further stated, that he held the note about three years, during which time plaintiff was in Georgia, and at witness' house once or twice every year, so that he might have sued on the note, had he desired to do so.

In 1845, witness sold the note to defendant, who about the same time, also removed into Alabama.

On this testimony, the Court decided that the note was not barred, and allowed the same to be introduced as a set-off.

To which decision plaintiff excepted, and brings up the same for review.

TRAMMELL, for plaintiff in error.

UNDERWOOD, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The only question made by the record in this case, is whether the note offered in evidence, by the defendant, as a set-off, is barred by the Statute of Limitations.

Without expressing any opinion whether non-residents, at the time of the execution of the note, are within the exceptions mentioned in the Statute of Limitations, we are quite clear in our judgment, that this note is barred by the Statute, according to the facts stated in the record.

The plaintiff, who was the maker of the note offered as a set-off, resides in the State of Alabama. The defendant became the holder of the note in April, 1845. While the note was in the hands of the original payee, and *after it became due*, the plaintiff returned to this State the same year, and had returned to this State once or twice every year since, a day or two at a time, so that the original payee and holder of the note, could have sued the plaintiff, had he desired to have done so.

The record discloses the fact of the *return* of the maker of the note, into this State the same year *after it became due*, and that the holder of the note could have sued him, had he desired to have

done so. The Statute commenced to run from the time of the return of the maker of the note into this State, *after its maturity*, so that he could have been sued *upon it*. *Fowler vs. Hunt*, 10 *Johns, Rep.* 464. *Farr vs. Roberdeau's executor*, *Cranch's R.* 194.

Let the judgment of the Court below be reversed.

NO. 45.—SEABORN JONES *et al.* vs. WILLIAM DOUGHERTY.

- [1.] A writ of mandamus or prohibition will not be granted by this Court, to one of the Judges of the Superior Court, when acting as Chancellor, to restrain him from hearing and adjudicating a motion made before him, on the ground that one of the parties has excepted to his decision on a point made before him, during the hearing and progress of such motion, and sued out a writ of error thereon, and filed bond, &c. according to the Statute, before there has been any decision upon the main question involved in the original motion made before him.
- [2.] The rule of this Court is, that either party may except to the decision of the Chancellor, during the progress of a motion before him; but that a writ of error cannot be filed, so as to operate as a *superseedeas*, until the *main question* involved in the original motion has been decided; and then, the party *against* whom the decision of the main question involved in the original motion shall be made, may except to such decision, file his writ of error thereon, and include all his other exceptions taken in the progress of the motion; and such writ of error, on a compliance with the terms of the Statute, will operate as a *superseedeas* to the *judgment*, which may be awarded by the Chancellor upon the *main question* involved in the *original* motion.

Petition for mandamus or writ of prohibition against Judge IVERSON, in a cause pending in Muscogee Superior Court.

The facts of this case are as follows :

By order of the Superior Court of Muscogee County, upon a bill filed for that purpose, by William Dougherty for himself and others, Seaborn Jones, who was a trustee named in a deed

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of trust executed by Daniel McDougald, conveying certain property for the benefit of creditors, had been removed from said trust, and A. S. Rutherford appointed a receiver to collect and apply said trust funds. A motion was then made before the Judge at Chambers, by said Dougherty, that Seaborn Jones, Duncan McDougald, Ann Eliza McDougald and Alexander McDougald, be summoned to appear, on a day fixed, before the Court, to discover, on oath, what portion of said trust property they had in their hands respectively; to account for the same, and to turn it over, by proper conveyances, to said receiver.

To this motion Seaborn Jones, Ann E. McDougald and Duncan McDougald filed their answers in writing. Alexander McDougald was examined *ore tenus* before the Court and discharged from the order. The plaintiff then moved an additional order, requiring the said parties to answer certain interrogatories, in writing, by him propounded; which order was granted by the Court, after objection made by the defendants, who thereupon filed their bill of exceptions, returnable to the July Term, 1852, of the Supreme Court, for Americus, alleging the granting of said order as error and seeking to renew the same. This bill of exceptions was sanctioned by the Court, and bond filed in terms of the law.

Subsequently to the filing of this bill of exceptions, William Dougherty again appeared before the Judge in Chambers, and moved that a day be appointed on which said Duncan McDougald, Ann E. McDougald and Seaborn Jones should answer said interrogatories; which motion, after objection made and argument, was granted by the Court.

And the said parties defendants now appear, by counsel, before this Court and move a writ of mandamus or prohibition, to be directed to the Judge of the Superior Court of Muscogee County, restraining all further proceedings of any kind, in said cause, and especially the order to answer last mentioned, until the decision of said bill of exceptions at the next Americus Term.

ALEX. C. MORTON, for the petitioners.

WM. DOUGHERTY, *contra*.

By the Court.—WARNER, J. delivering the opinion.

This is an application for a mandamus or prohibition, to the Judge of the Chattahoochie Circuit, to restrain him from proceeding to the adjudication of a motion pending before him, as Chancellor, on the ground, that decisions have been made by him during the progress of the motion, which have been excepted to, and taken up to this Court by writ of error, according to the provisions of the Statute, in such cases made and provided.

[1.] It appears from the record before us, that a receiver had been appointed by the Chancellor to receive and secure certain alleged trust property, specified in a deed of trust executed by Daniel McDougald, in his life time. Subsequently a motion was made before the Chancellor, that the petitioners should turn over into the hands of such receiver, the trust property alleged to be in their possession, the Chancellor, under our practice, performing the duties of a Master in Chancery in England, in regard to that motion. Proceedings were had before the Chancellor, from time to time, upon the motion, which had been made before him to turn over the trust property, and various rulings and decisions were made in relation to the legal points raised by the petitioners, to which they excepted, and sued out a writ of error to this Court, for the purpose of having such rulings and decisions reversed. The progress of the motion has been postponed from time to time, to suit the convenience of the respective parties, on their application, upon cause shewn, and the *main question* involved in the motion, (to wit,) whether the alleged trust property, in the hands of the petitioners shall be turned over by them into the hands of the receiver, has not yet been decided by the Chancellor. The question made for our consideration and judgment, is whether the petitioners can, by excepting to

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the decisions of the Chancellor, made during the pendency and progress of the motion before him, upon points of law raised by them, sue out their writ of error, give bond and security, as required by the Statute, and have the same to operate as a *supersedeas*, to the further hearing and decision by the Chancellor of the *main question* involved in the *original* motion.

[2.] While it is unquestionably the right of the petitioners to except to the decisions of the Chancellor upon legal questions raised by them before him during the progress of the motion; yet, in our judgment, the suing out of a writ of error thereon, before the judgment of the Chancellor shall be awarded upon the *main question* involved in the *original* motion, is *premature*. *Non constat*, that the judgment upon the *main question* involved in the *original* motion, will be awarded against them by the Chancellor.

We consider the whole proceedings had before the Chancellor in relation to the motion to turn over the trust property into the hands of the receiver, as a *quasi* trial of that *main question*, and when the main question shall be decided by the Chancellor *against* them, then they will be entitled to except to that decision, and sue out their writ of error, in which all the exceptions taken to the rulings of the Chancellor, during the progress of the original motion before him, can be included, and made available to them on the hearing before this Court, if well founded in law; and such writ of error so sued out by the petitioners, upon a compliance with the provisions of the Statute, in such cases made and provided, will operate as a *supersedeas* to the judgment of the Chancellor upon the *main question* involved in the *original* motion.

The principle which must govern this application, was settled by this Court, in *Carter and Wife vs. Buchanan*, 2 *Kelly*, 338.

After citing the Act of 1845, organizing this Court, we said in that case: "This grant of jurisdiction was designed to be, and is, very broad. It attaches upon any *decision, sentence, judgment, or decree* which may be had before the Superior Courts, in any case, criminal or civil. Unlike the jurisdiction of the Supreme Court of the United States, it is not confined to *final*

judgments. It contemplates, unquestionably, writs of error upon interlocutory judgments; and such has been our construction of the law, for we have entertained writs founded upon orders to dissolve injunctions in Chambers, and upon *motions for new trials.* Yet there are some limitations to the grant. *There must be a decision, sentence, judgment, or decree, and that quoad the subject matter of it,* must not be *inchoate* or *interlocutory*, but *final.* It may be interlocutory as to the cause, but as to the point decided, it must be *final.*" The application for a mandamus or a prohibition to the Chancellor, is therefore, refused; and let judgment be entered on the record, in accordance with the views expressed in the foregoing opinion.

SUPREME COURT OF GEORGIA.

MILLEDGEVILLE TERM, 1852.

MONDAY, 3d MAY, 1852.

The Honorable the Supreme Court met pursuant to adjournment. Present their Honors JOSEPH H. LUMPKIN, HIRAM WARNER and EUGENIUS A. NISBET, Judges.

On motion of Col. Iverson L. Harris, a Committee of five members of the bar of this Court was appointed, consisting of Messrs. Harris, Hardeman, Kenan, Rockwell, and Cobb, to report during the present Term of the Supreme Court, resolutions in relation to the death of the Honorable JAS. A. MERIWETHER, late of Eatonton, Putnam County.

MILLEDGEVILLE, 4th May, 1852.

At a meeting of the members of the Bar of the Supreme Court of Georgia, in attendance at this term, in the Court room, the following resolutions were presented by the committee appointed, and unanimously adopted.

Resolved, That the members of the Supreme Court Bar, feel with deep sensibility, the loss which the State and profession have sustained by the death, in the meridian of life, of the Honorable *James A. Meriwether*, a member of this bar, whose distinguished career as a lawyer, a Judge of the Superior Courts of the Ocmulgee Circuit, and as an ardent and influential politician, is well known to the public.

Resolved, That as a testimonial of the respect in which we cherish the professional learning of the deceased, and the remembrance of the courteous, patient, assiduous, and able discharge of his duties whilst one of the Judges of this State, and his private character as a man, in the social and family circle; that the Supreme Court be requested to cause these resolutions

Tribute of Respect to the Memory of Judge Meriwether.

to be entered upon the minutes of the Court, as a small, but enduring tribute to the memory of our deceased associate.

Resolved, That the Supreme Court be requested to instruct its Clerk to cause a copy of the proceedings had on this occasion, to be transmitted to the family of the deceased.

To which Judge *Lumpkin* responded in the following remarks:

Gentlemen of the Bar :—It is right to cherish the memory of our distinguished citizens ; they shed a glory on the annals of our State, and are bright examples for the present and future generations. The flame of liberty has been caught by distant ages and nations, from the great men of Greece and Rome ; and the names of Demosthenes and Cicero, have waked up the courage and eloquence of patriots, for two thousand years, and taught them to resist tyranny and triumph over oppression.

A life of professional labor furnishes but few incidents, which, to the great mass of mankind, would seem worthy of record. There is nothing of "pomp and circumstance," to attract admiration. But then, on the other hand, the lawyer's trophies are unstained with blood ; and wailing and woe, mingle not in the chorus of his praise.

Judge *Meriwether* was no ordinary man ; descended from the best blood of the revolution—his father being the companion in arms of Colonel William Washington—his personal intrepidity was never doubted. Proud spirited and of quick feelings, he had much of that readiness of perception and warmth of soul which, when combined with strong powers of reasoning, constitute genius. The prominent traits of his mind, were perspicuity, force and ardor.

As a politician he has long been regarded as one of the most efficient leaders in the State. He took his position boldly and advocated it fearlessly. Like all men of ardent temperament, he encountered determined opponents, and never failed to win over and draw around him admiring and devoted followers and friends. As a lawyer, he managed his cases before the Jury with tact, skill and judgment. His arguments were clear, close and strong. At times he became earnest and animated, and all the

electricity of his soul seemed to shoot along the veins of every Jurymen in the box. His speeches before this Court were always carefully prepared, learned and ingenious. His argument in the case of *Neal against Farmer*, delivered in this place last May, will long be remembered by those who were privileged to hear it, as not only a monument of his research and industry, but a model of earnest and impressive forensic oratory. Wholly engrossed with the subject, he was on that, as on many other occasions, truly eloquent, without apparently intending it, and without seeming to be conscious of it.

As a Circuit Judge, he possessed peculiar endowments—rare qualifications for the office. He was discriminating, prompt, diligent, authoritative, impartial, energetic, just, and laborious. He never shrunk from the discharge of his duty, from fear of any person or event.

Occupying a seat that had been filled successively by Early and Shorter, and Cobb and Lamar, and many of the brightest luminaries of the law, he might well feel appalled, while contemplating the great talents of his predecessors. Yet all agree who witnessed his judicial administration—that however weighty his subject, he was equal to it—that his intellectual strength was fully adequate to the performance of every duty. His lucid manner, critical acumen, and analytical powers were uncommon. If at times he was impatient and restive, it is to be attributed to ill-health and nervous derangement—to physical rather than to mental causes. That he had his imperfections, will be readily admitted, for he was a man of like passions and temptations with ourselves.

He was a firm believer in the christian religion ; and felt his obligations to God and his fellow-men, for the faithful performance of his public duties. And in this, as in every thing else, he gave proof of the acuteness of his understanding, as well as the solidity of his judgment. For we may as well undertake to blot out Vesuvius and Niagara from the works of God, as to deny to Him the authorship of the Bible ; and to write down or sneer down the tempest and the earthquake, as a book, which in the last conflagration, when all other volumes ever read or known

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on earth, shall be consumed, will remain uninjured, and will be the only authority recognized in the trials and decisions of that day.

The law is generally accounted a stern mistress—requiring of her followers an untiring devotion at her shrine; and it is rare that her servants find leisure for eminence in any other pursuit. Judge *Meriwether* was a ripe scholar, and confessedly one of the ablest writers of his day.

Like hundreds in this climate, from sedentary habits and severe attention to his profession, his constitution was soon shaken and undermined. What signifies that nature hath given to us bone and muscle for strength and hardihood? How soon we grow old and decrepit; and envy the life of the laborer in the field, or the workshop, whose sleep is sweet, and who, fearless of the elements, defies the sun-shine and storm.

How many fallen flowers of hope and promise are scattered and lost on the pathway of the legal profession! The canker worms are concealed in the buds; and as they open to diffuse their fragrance, the work of destruction begins. How many have died in our midst—in the meridian of their days! Harris, Upson, Campbell, Meriwether, and a host of others in our State—left the world in the summer of life, before a single chill of autumn had seared a leaf or changed a hue of their honors. The world deploras their untimely loss and weeps at their urns, revolving the mysteries of Providence. But the distress we feel in thinking of all they might have done and been, is not half so poignant as the pain we suffer in looking on the ruins of a mighty mind.

Newton, who “unfolded nature’s laws,” long survived his intellectual vigor. “Swift expired a driveller and a show.” And Luther Martin lived to forget the name of his son-in-law. The subject of our meeting, neither lived too long, nor died prematurely; but at the time when his mind was yet unimpaired—when his services to his country had reached a goodly measure—when his fame had spread far and wide, he closed his career and finished his record.

To his family, his death was too soon—to the Bench and the

Bar, it was too soon—to his native State, which delighted to honor him, it was too soon. But those who love to dwell on what is full and entire, and that which is beyond accident or decay, will be satisfied that God has foreclosed the possibility of our ever seeing him, not what he was—will rejoice that the seal of eternity has been put upon his virtues; and that his reputation is placed upon an imperishable basis for his country's and his children's inheritance and pride.

Were I asked to what one cause more than another, the success of the deceased was owing, I should unhesitatingly answer, to his ceaseless and untiring industry. He perfected, by unwearyed exercise, every power with which he was endued. Never was any man more diligent in his employment. This was the secret by which he outstripped others in the race. The time which they gave to pleasures or to sleep, he gave to the enlargement of his knowledge. His mind was a rich magazine of facts. Would that the young would profit by his example! The mighty orbs that compose the planetary system, wheel on in an incessant course, and thus preserve unbroken, the order of day and night, of seed-time and harvest. Every atom throughout the universe is in motion. Under such inducements to activity, to be slothful is criminal. An idler is a cumberer of the ground.

In lingering around the last rites which we shall ever pay to our deceased brother, we derive a consolation from knowing that all his troubles are over; and that he is in the hands of an all-perfect, and benevolent God. The lessons of instruction from the tomb are spoken with a tongue on which hang more than mortal accents. Death comes and there is no delay, no defence. The power of the prince—the wealth of the miser—the persuasion of an orator, cannot arrest the fatal and unerring shaft of the insatiate archer. In this solemn musing, we come to the just conclusion, that the greatest, happiest, and best of us, are but “poor wanderers of a stormy day,” of no certain destiny but death, and of no steadfast hopes but Heaven!

We will not presume to draw aside the veil which separates the domestic from the public and professional life of our deceased brother; nor to speak of him in those near and dear relations,

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in which he displayed the most attractive traits of his character. The void that is left in the hearts of that once happy, but now afflicted circle, can never be filled; and in the removal of him who was their pride, hope, and joy, they can find no other consolation, except in the recollection of his well-spent life; and in the expectation and assurance of a happy re-union beyond the grave. We unitedly tender to them our sincere sympathy!

When the above was read, Judge NISBET said:

Gentlemen of the Bar:—I beg leave to say a single word. This becomes proper only, because the response of my brother *Lumpkin*, was stated by him to be a personal one.* I wish only to say, that his eloquent and truthful exhibition of the character of our learned and eminently gifted brother, *Meriwether*, has my sincere and cordial approval. He doubtless had faults, but let him who has none, cast the first stone. We remember his distinguished virtues, forgetting those foibles which are incident to all humanity.

*NOTE.—Judge NISBET misunderstood Judge LUMPKIN. The remarks are inserted as made.—[Reporter.]

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
MAY TERM, 1852.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET. }

No. 46.—ANDREW Y. HAMPTON, survivor, &c. plaintiff in error,
vs. FRANCIS THOMAS, administrator of John Hampton, deceased, defendant in error.

[1.] In a case where the verdict of the Jury was in favor of the defendant, and there was no evidence applicable to the issue made by the pleadings in his favor, and there was evidence in favor of the plaintiff, a new trial will be awarded, upon the ground that there was no evidence to sustain the verdict.

In Equity, in Laurens Superior Court. Motion for a new trial. Decided by Judge HANSELL, March Term, 1852.

This bill was filed by Andrew Y. Hampton, as surviving partner, against Francis Thomas, as the administrator of John M. Hampton, a deceased partner, alleging that there had been a co-partnership business between said Andrew and John, “in a saw and grist mill, blacksmith shop, stud horse and jackass business,” and continued from 1835 to 1841, when the said John M. bought out the interest of Andrew W. in the mills, and paid

him therefor; leaving unsettled the profits of the partnership, amounting to \$5000, all of which was in the hands of said John M. when he died. To collect one-half of which, with interest for eight years, this bill was filed against the representative of said John M.

On the trial of this cause, there was in evidence, a letter from Andrew Y. Hampton, to John M. Hampton, dated 23d January, 1847, in which he says: "I do not, upon a settlement, owe you one dollar, but on the contrary, my brother, upon a fair settlement, you owe me very considerable. You yet owe me my mill interest—you owe me for a great deal of hauling—you owe me some borrowed money—you owe me for moving your gin-house and building your screw, &c."

Also a letter from John M. Hampton to Andrew Y. Hampton, dated January 3d, 1847, in which he says: "In regard to what I am owing you, please send in your notes and account to M. G. O'Neal, and I will pay them when presented. In fact I was unapprised (until you notified me) that I was owing you anything, or I would have paid you before you left; or at least, I would have settled and given my note, but I am now able to pay money to almost any amount. I was apprised of the work which you had done—your mill interest and some hauling, which will afford me pleasure to settle for, though the screw pin has bursted two feet round the thread off, but this is a matter of no consequence. I can soon build a new screw, as I have only ginned twenty bales of mine. Time is no object with me at this season of the year." In a postscript he said: "Since writing this letter I have received a ream of paper, in the form of a bill in Equity, against the executors of And. Hampton, J. M. & A. Y. Hampton, stating that they are withholding Rachel Griffin's share of property, and that the executors are insolvent and wants some guardian appointed. Andrew, you must make some arrangement, as I shall make no defence, but turn over every cent and give a true account of the balance. Say to Jack we are sued, and he must pay his part upon the Peter Adams debt. I only have in my hands about twenty-five hundred dollars which be-

long to you, with the interest since you sold your half of the mill to me, and I am anxious to have the matter wound up."

The Jury returned a verdict for the defendant. Counsel for complainants moved for a new trial, on the ground that the verdict was contrary to, and not sustained by the evidence. The Court refused the motion, and this decision is assigned as error.

MORGAN and ROCKWELL, for plaintiff in error.

I. L. HARRIS, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] This is a case where we think the discretion of the Court in refusing a new trial, ought to be controlled; as we think that the verdict for the defendant below, was without evidence for him, and against evidence for the plaintiff. We have repeatedly held that if there is no evidence to sustain the verdict, a new trial will be awarded. This bill was filed by a surviving partner, to recover out of the estate of the deceased partner, the one-half of the effects belonging to the concern, and which are charged to have come into his hands whilst in life, and which now constitute a part of his estate. It charges that the co-partnership was formed in 1835, and continued until 1841, and consisted of the conduct of a saw and grist mill, blacksmith's business, and the keeping of a stud horse and jackass. That in 1841, the complainant sold to his partner, the defendant's intestate, his interest in the mills, *which he paid him for*; that the effects which the firm had made, \$5000 in amount, were left in the hands of the defendant's intestate at that time, and that he collected in the debts and realized on all the effects. The prayer is, that the defendant account with the complainant, and pay over to him, the one-half of those effects, with interest. The answer admits the co-partnership—admits that the deceased partner bought the complainant's interest in the mills in 1841, and *paid for it, as charged in the bill*. It does not admit that the intestate took charge of the effects of the firm and realized up-

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on them, but puts the complainant upon proof of his allegations as to these matters. From this statement, it is manifest that the pleadings make no issue about the payment of the purchase money for the one-half of the mill interest, sold in 1841 to the defendant's intestate.

The complainant admits in his bill that *that was paid*, and he is estopped by that admission; he could not aver against it; he could introduce no evidence to prove that it was not paid. He is shut in to the case which he makes. *Peacock vs. Terry*, 9 Ga. R. 149, 150. The defendant on the record, who is the administrator upon the estate of the purchaser of that interest, admits *that it was paid as charged in the bill*. Upon the pleadings therefore, it is the judgment of the law, that *that* matter was not in issue, and could not be considered by the Court or the Jury. The conclusion of the law is before the admission of both parties on the record, that the price of the complainant's interest in the mill property, was paid to him by the defendant's intestate, when he bought it in 1841.

The only question made for the Jury by the pleadings, was this: is the estate of the deceased partner indebted to the complainant anything on account of the partnership profits, which had been made prior to its dissolution by the sale of the mill interest in 1841. That was the issue made—to that issue alone can the evidence be applied, and that was the issue upon which the verdict was rendered; it was rendered in favor of the defendant. Our duty is now to enquire whether there was any evidence to authorize that verdict? If there was none, the re-hearing ought to have been granted by the presiding Judge. The only evidence before the Jury besides the answers (and that contained none except as before stated) was a letter addressed by the complainant to the intestate of the defendant, in 1847, and his response thereto. In his letter, the complainant tells his brother (the intestate of the defendant, he being then in life) *that he does not, upon settlement, owe him one dollar, but that on the contrary, he owes him very considerable*. "You yet owe me (writes the complainant farther) *my mill interest*—you owe me for a great deal of hauling—you owe me some loaned money—you owe me for moving your

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gin-house and building your screw, &c.” To this letter, after a few days, the defendant’s intestate responded; among other things, saying, “In regard to what I am owing you, please send in your notes and accounts to M. G. O’Neal, and I will pay them when presented. In fact, I was unapprised (until you notified me) that I was owing you anything, or I would have paid you before you left; or at least, I would have settled and given my note. But I am now able to pay money to almost any amount. I was apprised of the work you had done—your *mill interest*, and some hauling, which it will afford me pleasure to settle for, &c.” Again, in a *postscript*, he says: “Since writing this letter, I have received a ream of paper in the form of a bill in Equity, against the executors of *And. Hampton, J. M. & A. Y. Hampton*, stating that they are withholding *Rachel Griffin’s* share of property, and that the executors are insolvent, and want some guardian appointed. *Andrew*, you must make some arrangement, as I shall make no defence, but turn over every cent and give a true account of the balance. Say to *Jack* we are sued, and he must pay his part on the *Peter Adams* debt. *I only have in my hands about twenty-five hundred dollars which belongs to you, with the interest since you sold your half of the mill to me. I am anxious to have the matter wound up.*”

In the letter of the complainant, he claims that his brother is indebted to him, and specifies that he owes him on account of *his mill interest*. *Answering this letter*, the intestate of the defendant tells him to send his notes and accounts to *M. G. O’Neal*, and he will pay them—which would seem to imply indebtedness. He says then, that he was unapprised that he owed the complainant anything, until notified by him. Whilst this statement implies ignorance of indebtedness, before being notified, it concedes it after he was notified. He then, contradicting his previous statement, that he was unapprised that he owed the complainant anything, says, that he was apprised of the work which he had done—of *his mill interest*, and some hauling, for which he says it will afford him pleasure to settle. In the *postscript*, he makes a distinct admission, that he has in his hands, belonging to the complainant, about twenty-five hundred dollars, with in-

terest, from the sale of the mill interest to him, in 1841, which he declares himself anxious to settle. In the argument it was insisted that the admission about the *mill interest*, and the admission that he had \$2500 in hand, belonging to the complainant, are to be referred to the purchase of his interest in the mills in 1841; that the complainant sets up no claim for anything in his bill on account of that sale; that they are not evidence of the claim which the complainant does make in his bill for the one-half of the partnership effects which came into his hands; that the Jury so considered them; and these things being so, there was no evidence at all to support the complainant's case, and the verdict ought not, therefore, to be disturbed. In the absence of the admissions in the record, both by the complainant and the defendant, that the purchase money for the complainant's half of the mill property sold in 1841 *was paid*, I admit that it would be doubtful whether the writer of this letter was speaking of, and referring to that, or the complainant's interest in the proceeds of the partnership before the sale in 1841. The half of the interest in the mill property, is a *mill interest*, and at the same time the half of the effects or profits which resulted from a partnership in mills, is a *mill interest*. So that in that event, we could not disturb the verdict. But by the legal necessities of the pleadings, the inquiry whether the purchase money was or not paid, was not before the Jury. *It was paid*, as a conclusion of the law, drawn from the admissions in both bill and answer, and the Jury were not at liberty to refer the admissions in the letter to the transaction of the sale. The learned counsel insists again, that in point of fact the statements in the letter referred to the sale, and if so, they were irrelevant to the complainant's claim for the one-half of the partnership effects, and if irrelevant, there was no evidence to support the complainant's case; that the Jury had the right so to consider them, and, *therefore*, the verdict for the defendant ought not to be disturbed. But I apprehend that upon the admission by both parties, that the purchase money for the one-half of the mills was paid in 1841, either out of the Court house or in it, it would be impossible for any one to say, that when six years afterwards, the defendant's intestate admit-

ted that he had in his hands \$2500 belonging to the complainant, he spoke of \$2500 due on account of that transaction of sale. The admissions are obliged to refer to something else. To what else can they refer, than to the interest in mills which the plaintiff claims? It is within the range of possibility, that they may refer to some third account between the parties; but that is altogether conjectural. The Jury were called to apply them to the issue made for their trial; there is no evidence to authorize their application to any other matter. They had before them an acknowledgement that the defendant was indebted on account of a *mill interest*. The complainant's claim, as set forth in his bill, grew out of a partnership *in mills*. They had before them, a distinct admission that the defendant's intestate had in his hands, belonging to complainant, \$2500. The complainant charged, that he had received five thousand dollars worth of effects, growing out of the partnership *in the mills*, blacksmith's business, &c. one-half of which, belonged to him. Was not the case, *in the absence of any testimony for the defendant*, made out for the complainant? We think it was, and are obliged to hold that there was no evidence for the defendant, in whose favor the verdict was rendered.

The defendant's intestate, in the *postscript*, does not speak of the \$2500, as a *sum due* for a purchase, as would be natural if he referred to the purchase, but as a *sum in hand* belonging to the claimant, which is also a natural form of expression, where the sum is derived from property of another. The fact that he admits interest upon it to be due since the sale of the one-half of the mills, is laid hold of to prove that the party referred to a sum due on that purchase. But it was at that time that he took in hand the partnership effects, and may very well have concluded in his own mind, that complainant's share of them would bear interest from that time, and therefore, so expressed himself.

Let the judgment below be reversed.

No. 47.—JOHN J. MITCHELL, plaintiff in error, vs. JOHN TREANOR, defendant in error.

- [1.] Cohabitation is presumptive evidence of the wife's authority to contract; and it is for the husband to rebut the presumption by showing that the goods were supplied under such circumstances that he is not bound to pay for them. But where the husband and wife are living apart, the *onus* lies the other way; and it is for the tradesman to show that the separation has taken place under such circumstances as will render the husband liable.
- [2.] *Subsequent* provision made by the Court for *past* alimony will not bar the right of recovery for goods previously furnished.
- [3.] If the tradesman supplies the goods to the wife, and gives the credit to her, the husband is not liable.
- [4.] Whether the credit was given to the wife or the husband, is a question of fact for the Jury.

Assumpsit, &c. in Baldwin Superior Court. Tried before Judge JOHNSON, February Term, 1852.

This was a suit by John Treanor against John J. Mitchell, upon an account for merchandize. The following statement of facts was agreed upon by the parties in the Court below :

“ The goods charged in the account of plaintiff, were purchased by Mrs. Catharine Mitchell, the wife of defendant, in the year 1849, commencing on the 3d February and ending on the 27th December, 1849—she, during the whole time, living separate and apart from her husband; having been constrained by family disagreements, and the unkindness of her husband, to leave the house of her husband, and live apart from him, with her infant child, seven years of age. During the separation aforesaid, she purchased and received the articles in the account sued; and they were charged by the plaintiff on his original book of entries to her, and not to Dr. Mitchell. Dr. Mitchell was then, and now is, possessed of some thirteen negro slaves and other property. The articles purchased were suitable to his pecuniary circumstances. At the time of the separation, no provision was made for the wife and child. Subse-

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quent to the making of the account, to wit, in February, 1850, a partial divorce was granted to Mrs. Mitchell; and the Jury allowed for past maintainance in their verdict granting the divorce. Dr. Mitchell gave an order to a third person, addressed to plaintiff, during the year 1849, desiring him to furnish the bearer with six yards of homespun; and which order plaintiff refused to comply with, saying Dr. Mitchell had no account there."

Upon this agreed statement of facts, the Court charged the Jury: "That Mrs. Mitchell having been constrained by the unkind treatment of Dr. Mitchell, to leave his house and live separate from him, without any provision having been made for her support, carried with her a letter of credit for necessaries suitable to the condition of the husband; that the subsequent provision for alimony did not affect the liability of the husband to the merchant, unless it be shown that the alimony had been paid, and applied to the payment of such account for necessaries. The Court does not consider the charge of the goods to Mrs. Mitchell, as affecting the right of the plaintiff to recover from the husband."

This charge is assigned as error.

W. S. ROCKWELL, for plaintiff in error.

I. L. HARRIS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This was an action of assumpsit, brought by John Treanor against John J. Mitchell, to recover the value of a bill of goods furnished by the plaintiff to the wife of the defendant. The facts, as agreed upon by the parties, are these: The merchandize charged in the account was purchased by Mrs. Mitchell in the year 1849, commencing on the 3d of February and ending on the 27th of December of that year; she, during the whole of that time, living separate from her husband; having been constrained, by family disagreements and unkindness, to leave

his house and live apart from him, with her infant child, seven years old. The articles were charged in the original book of entries to the wife, and not to the husband. It appeared also, that during the year 1849, Dr. Mitchell gave an order to some third person, addressed to Treanor, desiring him to supply the bearer with six yards of homespun, which the plaintiff refused to purchase; saying, that Mitchell, the defendant, had no account with him.

Dr. Mitchell was then, and is now, in possession of some thirteen slaves and other property; and the things bought were suitable to his circumstances and condition in life. At the time of the separation, no provision was made for the wife. Subsequently, to wit, in February, 1850, a partial divorce was granted to her; and by the verdict of the Jury, an allowance for past maintenance was decreed by the Jury.

Upon this testimony, is the husband liable for the debt?

[1.] As cohabitation is presumptive evidence of the wife's authority to contract, it is for the husband to rebut that presumption, by showing that the goods were supplied under such circumstances, that he is not bound to pay for them; but where the husband and wife are living apart, the *onus* lies the other way, and it is for the tradesman to show that the separation has taken place under such circumstances as will render the husband liable. 2 *Bright on Husband and Wife*, 11, 12.

We think the proof that the wife was *constrained* to leave the house of the husband, on account of mistreatment, is sufficient to make him chargeable for her maintenance. She was ejected from his domicile with a letter of credit for necessaries.

[2.] Neither is he relieved from liability by the *subsequent* provision made by the Court and Jury, for *past* alimony, the goods having been previously delivered.

[3.] But did Mr. Treanor deal with Mrs. Mitchell on the credit of the defendant, her husband? If he did not, then the husband is not answerable.

Chancellor *Kent* lays down the rule explicitly, that if the tradesman furnishes the goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time liv-

ing with him. (2 Com. 146.) *A fortiori*, is he not liable if they were living apart!

Mr. *Bright* says the husband has been held not to be liable where the dealing with the wife took place on the credit of another; and *where the tradesman made out the invoice and accounts to the wife*, and drew bills of exchange for her to accept. *Bright on Husband and Wife*, 18.

Clancey maintains the same doctrine. *Treatise on Hus. and Wife*, 25, 26.

The principle thus stated is fully sustained by all the reported cases. See *Holt vs. Brien*, 4 B. & Ald. 252. *Montague vs. Benedict*, 3 B. & C. 631. *S. C. Montague vs. Barron*, 5 Dowl. & Ry. 532. *Harvey vs. Norton*, 4 Jur. 42. *Freestone vs. Butcher*, 9 Car. & P. 647. *Metcalfe vs. Shaw*, 3 Camp. 22. *Bentley vs. Griffin*, 5 Taunton's Rep. 356.

In the case in 3d Campbell, Lord *Ellenborough* declared that it was a *plain ground*, that if the goods were not supplied on the credit of the husband, that he was not liable.

On a writ of error, to reverse a judgment of the King's Bench, it was decided in the Exchequer Chamber, that assumption against the husband for money lent to the wife, at the request of the wife, was not maintainable; because, it appeared on the record, that the contract was made with the wife and the credit given to her, and not to the husband. *Stone vs. Mac-Nair*, in error, 7 Taunton, 432. 4 Price, 48.

Being satisfied then, that the general liability of the husband is repelled by the proof which goes to show that the credit was given to the wife, and that the plaintiff looked to her alone for payment, the cause must be sent down for another trial.

[4.] Whether a tradesman who furnishes goods to a wife, gives credit to her or her husband, is a question of fact, to be determined by the Jury.

No. 48.—L. P. HARWELL and Wife, plaintiffs in error, vs. J. W. ARMSTRONG and others, defendants in error.

[1.] Where an order was taken in a Court of Equity requiring a defendant to answer the complainant's bill within ninety days, or that the bill should be taken *pro confesso*, and the defendant having failed to file his answer within the time limited, the Court, upon cause shown, allowed the defendant to file his answer upon payment of costs, the answer being full and satisfactory; and refused to permit the complainants to take their bill *pro confesso*: Held, that the refusing the motion to take the bill, *pro confesso*, and allowing the defendant to file his answer upon terms, was a matter resting in the sound discretion of the Court below, which this Court would not control—there not appearing to have been any flagrant abuse of such discretion.

[2.] When the usual rule or order for a defendant in a bill in Equity to answer the same, is taken, it should always be entered on the minutes of the Court. The mere memorandum on the Bench docket, that leave was granted by the Court, to take the rule, does not furnish the proper evidence that the rule or order was *actually* taken, or the terms thereof.

In Equity, in Putnam Superior Court. Decision by Judge JOHNSON, March Term, 1852.

L. P. Harwell and wife filed a bill against James W. Armstrong and Joseph Johnson, returnable to March Term, 1851, of Putnam Superior Court. At that term, the entry of "Usual Rule" was made on the docket, but no order was taken on the minutes. At the September Term thereafter, no answer had been filed, when defendants' solicitor being present in Court, at his request, the following order was taken: "It is ordered that the answer be filed within ninety days after the adjournment of this Court, and on failure thereof, the bill be taken as confessed against them."

At the March Term, 1852, the answer not having been filed until after the expiration of the 90 days, solicitor for complainants moved to take the bill as confessed.

The Court refused the motion, and allowed the answer to be filed, on payment of costs—the Court certifying, that "on looking into the bill and answer, he was of the opinion that the an-

swer disclosed important interests connected with the defendants and others, not parties to the bill, and that the answer was full."

The excuse given for the failure to answer in time, was, that the solicitor expected to see his client in the City of Macon, on a visit there, within the time; but not seeing him then, he afterwards forgot it.

This refusal of the motion is assigned as error.

J. WINGFIELD, for plaintiff in error.

R. HARDEMAN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

In this case, the Court below allowed the defendant, Armstrong, to file his answer under the circumstances stated in the record: refusing to permit the complainants to take their bill *pro confesso*; and the question is, whether this Court will control the discretion of that Court, under this statement of facts? In *Moody vs. Fleming*, (4 Ga. Rep. 117,) this Court held, that it would not control the discretion of the Court below, only in cases where there is a refusal to exercise it, or a *flagrant abuse of it*.

[1.] This is a bill filed for discovery and relief. It is not so much the *privilege* of the defendant to file his answer, as it is the *right* of the complainants, to have the *discovery* sought by it. By neglecting or refusing to answer, the defendant is in *contempt* of the process of the Court. (1 *Daniel's Chan. Practice*, 538.) By allowing the defendant to file his answer in this case, the complainants only obtained what they originally sought by their bill. The answer was full and satisfactory, and disclosed important interests connected with the defendants and others, not parties to the bill.

The 53d section of the Judiciary Act of 1799 declares, that the defendant shall appear at the next term of the Court after the bill has been served according to the requisitions of the

Statute, and answer the same, and if he shall fail, or refuse to do so, the facts in said bill shall be taken *pro confesso*, and the Court may proceed to decree, as *to justice shall appertain*. *Prince*, 447. Now by this latter clause of the Statute, it would seem that the Legislature contemplated that the Court should exercise a sound discretion in the matter—such a discretion as *to justice should appertain*. It is true, that by another clause in the same Statute, the cause must be ready for trial at the farthest, at the fourth term of the Court from the filing of the bill; indeed, the trial of the cause cannot be extended to the fourth term of the Court, unless very *special* cause be shown. The bill, in this case, was filed at March Term, 1851. The answer was allowed to be filed at March Term, 1852; the *second* term of the Court, from the filing of the bill, unless the word “inclusive” intends that the term of the Court at which the bill was filed shall be counted; in that event, the answer was filed at the third term, and might have been tried at that term, had the parties been ready for trial.

The complainants in this case certainly do not occupy any better position before the Court than if their bill had been taken *pro confesso*. In *Wooster vs. Woodhull*, (1 *Johns. Ch. Rep.* 539,) it was held, that a defendant who has suffered a bill to be taken *pro confesso*, and a decree, by default, to be entered against him, may, under the special circumstances of the case, be let into a defence on terms; it resting in the sound discretion of the Court, to relieve the party or not, from the consequences of his default. See also, 2 *Maddock's Ch. Practice*, 249. We do not think the grounds upon which the application for the exercise of the discretion of the Court is based in this case, very strong or meritorious, on the part of the defendant; and had the Court refused the application to file his answer, we should not have been inclined to have interfered with its judgment; nor will we now interfere, to control the discretion of the Court below, in allowing the answer to be filed; inasmuch as the filing of the answer of the defendant will, in all probability, promote the ends of justice. As a matter of practice, the order for the defendant to

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answer a bill in Equity, should always be entered on the *minutes* of the Court.

[2.] The entry on the Bench docket, as we have repeatedly held, is not the proper evidence as to what has been done or adjudicated by the Court. The entry on the Bench docket of "usual rule," is only a memorandum of the presiding Judge, shewing that *leave* was granted to take the usual rule; but is not evidence that the usual rule *was taken* in the cause, for the defendant to answer. The minutes of the Court afford the evidence of that fact. To grant *leave* to take the usual rule for the defendant to answer, is one thing, and *actually taking*, or drawing up such rule or order for that purpose, is another, and much more substantial part of the proceedings in the cause.

Let the judgment of the Court below be affirmed.

No. 49.—SOLOMON B. MURPHY, plaintiff in error, vs. THE JUSTICES OF THE INFERIOR COURT OF WILKINSON COUNTY, defendants in error.

[1.] When there is money in the hands of a Sheriff, raised from the sale of a runaway slave, by virtue of a process issued in the name of the Clerk of the Inferior Court, on an order of the Justices of the Inferior Court; it is according to law to move a rule against him to require him to pay it over, in the name of the Inferior Court, and it is also competent for the Justices to preside on the trial of an issue formed on a traverse of the Sheriff's return to such rule.

[2.] If, on the trial of a cause, illegal testimony be admitted, a new trial will not be granted on that account; provided it is clear that there was evidence sufficient before the Jury to authorize the verdict, independent of the illegal testimony.

[3.] To a rule calling upon the Sheriff to pay over money, he returned that the money had been raised and paid over to the person authorized to receive it. Upon a traverse of such return: *Held*, that the Sheriff will be held to prove his averment that the money had been paid over.

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Certiorari, in Wilkinson Superior Court. Decided by Judge JOHNSON, April Term, 1852.

The Inferior Court of Wilkinson County, ordered the sale of a runaway negro, named Anthony, after a due advertisement of the same, as required by law. The Clerk of the Inferior Court issued a process, which he termed an attachment, requiring the Sheriff to sell, &c. The Sheriff levied this process on the negro, Anthony, and made the following return thereon :

“The above levy sold for four hundred and fifty-one dollars, and after deducting all costs and expenses, leaves a balance of two hundred and forty-seven dollars and twenty-five cents, paid to this attachment.
S. B. MURPHY, Sh’ff.”

Subsequently the Inferior Court passed an order as follows :

THE JUSTICES OF THE INFERIOR COURT,	} <i>Attachment from Wilkinson Inferior Court, returnable to January Term, 1847.</i>
vs.	
ANTHONY, a runaway negro man, slave.	

It appearing to the Court that Solomon B. Murphy, late Sheriff, has collected on the above stated attachment, the sum of \$451: It is ordered that he show his actings and doings in relation thereto, &c.

The Sheriff made return thereto, that he paid out for fees and expenses, \$252.58, leaving a balance of \$198.42, which amount he paid to A. B. Raiford, late Treasurer of the County. This return was sworn to by the Sheriff.

A traverse was filed to this return, and issue formed thereon.

Upon the trial of this issue in the Inferior Court, Murphy, by his counsel, objected to the Justices of the Inferior Court sitting in the cause, on the ground that they were the parties plaintiff of record, which objection was overruled and excepted to.

He then objected to the farther progress of the cause, on the ground that the Clerk, and not the Justices of the Inferior Court, was the proper party; which objection was overruled and excepted to.

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Plaintiff's counsel tendered in evidence, the deposition of A. B. Raiford, late Clerk and Treasurer, to show that the balance was never paid over to him. Defendant's counsel objected, on the ground that Raiford was interested and an incompetent witness. The objection was overruled and excepted to.

On these exceptions a writ of certiorari to the Superior Court was sued out, and on hearing the return thereto, Judge *Johnson* refused to sustain the writ; overruling the 1st and 2d grounds, and holding that there was evidence sufficient to sustain the verdict, without the testimony of Raiford.

In addition to the return on the attachment, it was proven that the books of the Clerk and Treasurer showed no money paid from the sale of said negro to the Clerk. There was no proof on the part of the Sheriff that he had paid the money to Raiford, the Clerk.

Exceptions were filed to Judge *Johnson's* decision, and error assigned thereon.

COCHRAN, for plaintiff in error.

BOWER, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The first exception which I consider is, that the Inferior Court of Wilkinson County were not the proper parties to move the rule against the Sheriff. The arguments to sustain this exception are, that the process under which the Sheriff raised the money by the sale of the negro, issued in the name of the Clerk of the Inferior Court; that by law the fund is payable to him; that he is the only person who could move the rule, and therefore the Inferior Court cannot move it. The law directs that runaways, when committed to jail, shall be advertised, and if no owner appears, the Jailer shall notify the Justices of the *Inferior Court*; whose duty it shall be to cause the slave to be levied upon by the Sheriff, and after being advertised, to be sold by him on the first Tuesday in the month, unless a claimant shall appear and

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prove property in him ; after paying jail-fees and all other expenses incurred on account of the slave, the balance of the money raised from the sale, is to be paid to the *Clerk* of the *Inferior Court*, and becomes a County fund, to be used as such ; provided farther, that if within twelve months after the slave is sold, any person shall appear and prove property in the slave, the *Justices of the Inferior Court* shall order the amount thus paid to the *Clerk*, to be paid to such person. *Cobb's New Digest*, 1003, 1004. This record discloses that the *Inferior Court* passed an order directing the slave, *Anthony*, to be sold, and the *Clerk* issued a process in his own name, reciting this order, directed to the Sheriff, requiring him to advertise and sell him, returnable before the *Inferior Court* of Wilkinson County. It does not appear that any claim to the slave was put in, either before the sale, or within twelve months thereafter. No claim whatever was established at any time. By Statute, then, the proceeds of the sale, after paying jail-fees and other expenses, became a fund belonging to the County of Wilkinson. The *Justices of the Inferior Court* are by law, the public agents or trustees of all County funds, and it is competent for them in that character, to institute such process or proceedings as may become necessary for the collection and safety of such funds. *Justices of the Inferior Court vs. Plankroad Company*, 9 Ga. R. 485, '86.

Upon this principle, it was legally proper for them to move against the Sheriff for this fund—nay, it was their duty to do so. No matter how the fund came into his hands—if it was a County fund, it was their duty to collect it; not as a Court, but as the agents of the law, charged with the general supervision and control of the property and money of the County. The *Clerk*, in issuing the process, acted ministerially. He has no authority to issue the process, without an order from the *Justices*. It was that order that gave vitality to the process. The *Justices* alone could order the sale, and upon that order, without a process, I have no doubt the Sheriff could have sold the slave. Electing, as they may do, to issue a process, they used, as they may do, their *Clerk* for the purpose. The fact that the money is by law payable to him, gives him no power over it—he is

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simply the depository. The legal control over it is in the Court. We find no objection to the ruling of Judge *Johnson* on this exception.

The next exception is, that the *Justices of the Inferior Court* could not try the issue on the traverse of the Sheriff's return, because, being parties to the proceeding against the Sheriff, they were sitting as judges in their own case. They were parties, as public agents, and not in their own right as citizens. It was not their case, but that of the County. They had no interest in the cause, different from, or greater than that of any other citizen. They occupied the position of naked trustees. The money, when paid over, would not go into their hands, but into the hands of the legally authorized depository of the County. By law, they have jurisdiction both of the subject matter and of the Sheriff. The whole of this record shows, that the proceeding was instituted to compel the payment of a public fund in the hands of the Sheriff; it shows how it was raised, and the final judgment passes it from the Sheriff to the custody of the law, and I do not entertain a doubt but that that judgment will be a complete bar to any subsequent proceeding instituted by the Clerk, or any other person, for the same money. We are satisfied that this exception was not well taken. See the case of *The Governor, &c. vs. Richard Basset and his sureties, determined at Macon, in February, 1852. Ante. 207.*

[2.] On the trial before the Inferior Court, the Clerk who was in office when the money was raised, a Mr. Raiford, was sworn, to prove that the Sheriff had not paid the money to him. He was objected to, as being incompetent from interest. The objection was overruled, and the ruling excepted to in the *certiorari*. Judge *Johnson* very properly decided against the competency of Raiford, but refused to send the cause back, upon the ground that independent of the testimony thus illegally admitted, there was evidence sufficient before the Jury that tried the traverse, to warrant their verdict—which was against the Sheriff. It was clearly competent for him to do this. It is well settled that a new trial will not be granted upon the ground of the admission of illegal evidence, if without that, it is manifest that from the evi-

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dence, the Jury were obliged to find as they did find. That is the rule of this Court—of the Superior Court, upon a motion for a new trial, and also upon the hearing of a certiorari.

Was then, Judge *Johnson* right in holding, that beside the illegal evidence, there was, plainly and incontrovertibly, testimony sufficient to warrant the verdict?

Upon the trial of the traverse, the process was in evidence, with the Sheriff's return thereon of the sale—of the disbursement for jail-fees and other expenses, and exhibiting a balance of upwards of two hundred dollars. His return to the rule acknowledged the sale—set forth the amount—the amount of payment on account of jail-fees and other expenses, and presented a balance of some \$198.42, which balance the return states, was paid to A. B. Raiford, the Clerk and Treasurer. It was also proven that the books of the Clerk and Treasurer showed no payment of this fund to him. There was no evidence for the Sheriff, except, that one witness testified, that he heard the Clerk ask the Sheriff for a settlement of this money, and that afterwards he heard the Clerk say that he had a settlement with the Sheriff, but whether the settlement spoken of was of this particular fund, the witness stated he did not know. Now, it is clear that the return on the process, and the admissions in the return to the rule, prove the balance in the hands of the officer for which the verdict was rendered. Upon this proof he is necessarily liable, unless he discharges himself by showing that he has paid it over, according to his response—or by proof of something else which is in law a discharge.

[3.] It was insisted in the argument, that upon a traverse, under our Statute, of a Sheriff's answer to a rule to pay over money, the return is *prima facie* evidence for him, and the traverser takes the burden of disproving it. Such is not the rule, without very important qualifications. The movant of the rule assumes the burden of proving the money in the hands of the Sheriff. If the Sheriff in his return denies the receipt of it, and it is traversed, the traverser, who is still the movant, would be compelled to disprove his return, and show that he has received the money. But in a case like this, where the return admits

the receipt of the fund, and goes on to aver a payment over, such averment is not evidence to discharge the Sheriff, but he will be held to prove it. He cannot both charge and discharge himself. He will not be permitted to be his own witness, and put his adversary upon proving a negative. He certainly is not in a more favored condition than a defendant in Equity, who is always held to proof of independent matter set up in his answer, in discharge or avoidance. Here the Sheriff did not sustain his averment, that he had paid the balance to the Clerk, by any evidence whatever, upon which a Jury could act. He stood charged with the fund by his return on the process and by his return to the rule, corroborated by the fact that no entry was found on the books of the Clerk, whose duty it is by law, to make such entry. If he had paid it over, it was incumbent on him to show it by legal proof; that he did not do, and the Jury, in our judgment, could not have found otherwise than they did.

Let the judgment be affirmed.

No. 50.—JOSEPH L. TERRY and others, plaintiffs in error, vs. W. BUFFINGTON and another, propounders, &c. defendants in error.

- [1.] Testamentary capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will.
- [2.] For the purpose of shedding light upon the state of the testator's mind when the will was made, evidence of its condition, both before and after the period, may be produced.
- [3.] As an independent fact, proof of incapacity at one period, is inadmissible to impeach a will made at another.
- [4.] When testimony has been introduced, showing that the testator's mind was the same when the will was made that it was at a subsequent period, when he was found to be *non compos mentis*, proof of his incapacity at the latter period, is relevant and proper to attack the will.

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- [5.] When insanity is once found, upon an inquisition of lunacy, it is presumed to continue; and the *onus* is cast upon those offering a will, to show that the disqualification has been removed.
- [6.] When it is apparent that justice *may* have been defeated by the misapprehension of the facts or the law, by the Court, in its charge to the Jury, the error calls for correction, as a matter of right.
- [7.] If, taking all the instructions collectively, the law seems to have been properly expounded to the Jury, the judgment will not be reversed, though some one opinion may be erroneous.
The correctness of a charge must be determined by the whole, taken together.
- [8.] Fraud is a distinct head of objection to the validity of a will, from importunity and undue influence; usually they are the very opposites of each other. Both are equally destructive of the validity of a will.
- [9.] By the Statute Law of some of the States, when insanity of the testator is alleged, the inquiry must always be, whether, at the time of executing or acknowledging the will, the testator was capable of making a valid deed or contract; and no inferior grade of intellect will suffice; but such is not the rule of the Common Law, nor in Georgia.
- [10.] The right to the free enjoyment and disposition of one's property, is required by the best interests of society.
- [11.] The phrase, "a mere glimmering of reason," used in *Potts and others vs. House*, (6 Ga. Rep. 324,) explained and illustrated.
- [12.] It is the duty of the Courts to administer justice according to law, and it is irregular and improper to call upon counsel to waive any legal right, in the presence and hearing of the Jury, who are charged with the case.

Caveat to will, on appeal in Elbert Superior Court. Tried before Judge BAXTER, March Term, 1852.

This was a caveat to the will of William Ward, deceased. The grounds of caveat were, 1st. Insanity; 2d. Undue influence; 3d. Fraudulent representations and practices on the part of the principal legatee in the will.

The will was dated 1st day of June, 1844. Much evidence was introduced on both sides, which it is unnecessary to be here repeated. After all the evidence was introduced, counsel for caveators proposed to prove by Dr. Edwin A. Jones, "that, as a physician, he examined deceased in November, 1849, and that, at that time, he was, from old age, or some other cause,

totally deprived of reason—being, as witness would term him, idiotic ;” caveator having previously proven that the condition of the deceased at that time was the same that it was in 1844, when the pretended will was executed. The Court rejected the evidence of Dr. Jones, on the ground that it was too remote ; which decision is the first ground of error assigned.

Counsel for caveators also offered in evidence, the record of a commission of lunacy, with the proceedings under it, in November, 1849, by which Wm. Ward was found to be an idiot and insane. The Court rejected this evidence also, (certifying that the result of the finding was not announced to the Court,) and this is assigned as error.

The Court charged the Jury, that “the probate of the will was resisted on three grounds, (naming them as above;) but that the last two, (undue influence and fraud) amounted to the same thing—but that the Jury might understand him fully, he had written down his charge as follows :

“You have two of the most difficult questions to determine, that can be submitted to the consideration of a Jury for their decision. Such is the peculiar character of the human mind—such is the difference in the intellectual powers of man—it is difficult to determine when capacity ceases and incapacity begins. What constitutes a sufficient capacity to make a will? If the testator, at the time he makes his will, has any mind ; is not an idiot or lunatic ; if his mind is not totally eclipsed ; if it is not entirely extinguished ; he has sufficient capacity to make a will. No imbecility, eccentricity, incapacity to make contracts, or extreme old age, unless the mind has become extinct from age, are sufficient to set aside a will. If you think the testator had not sufficient capacity, according to the above rule, then you ought to declare, by your verdict, that the will propounded, is not the last will and testament of William Ward. But if you believe from the evidence, that William Ward had, at the time he made this will, sufficient capacity ; by the same rule then, you ought to declare the paper propounded is the last will and testament of William Ward ; unless you be-

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lieve the will of William Ward was obtained by improper influences.

"To constitute improper influence, it must amount to moral coercion. It is constraining a man to make a will, contrary to his wishes, by excessive importunities, threats, fear, deceit, fraud or misrepresentations, whereby such control is acquired over the testator, as deprives him of his free agency, and constrains him to make a will contrary to his wishes. It is not improper to persuade, to appeal to the affections or understanding of the testator to make a will. The influence acquired over a testator by kindness or affection, is not improper. Thus, if you believe, from the testimony, that William Ward's will was obtained by improper influence or fraudulent practices, then you ought to declare the paper propounded is not the last will and testament of William Ward. But if you believe it was not obtained by improper influence or fraudulent practices, then you ought to declare it the last will and testament of William Ward."

On which charge, error has been assigned :

1st. Because the Court should have told the Jury, there must be mind acting regularly, and the will should be the emanation and result of that mind, in order to be set up.

2d. The Court erred in saying that "undue influence amounting to moral coercion, and fraudulent representations and practices in obtaining the will, amounted to the same thing, and that the latter must amount to moral coercion."

3d. That the charge in reference to these two last grounds is confused and calculated to perplex and bewilder the Jury.

4th. That the charge nowhere presents fairly to the Jury, the 3d ground of caveat, viz : fraudulent misrepresentations and practices.

After the Jury retired, one of their body returned and asked the Court, *privately*, to send out to them his written charge aforesaid. Whereupon, the Court inquired of the counsel, on both sides, *publicly*, if they would consent. Counsel for caveators remarked that it was irregular, and they could not consent; whereupon, counsel for propounder said, "we are per

fectly willing on our side." The Court then sent word by the Juror, that they could not get his charge.

Which proceeding by the Court is assigned as error.

T. R. R. COBB, for plaintiff in error.

W. T. VAN DUZER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This case comes up on a writ of error, from the Superior Court of Elbert County, on exceptions taken at the trial of issues which came before that Court, on appeal from the Court of Ordinary of the same County, upon a caveat against the admission to probate of a certain instrument of writing, purporting to be the will of William Ward.

There are several bills of exception; some to the rejection by the Court of evidence offered on the part of the caveators, to impeach the validity of the instrument; others to a series of instructions given by the Court to the Jury, after the testimony was closed; and one to the alleged misconduct of the presiding Judge, after the Jury were charged with the case, and had retired to their room.

The first question we are called upon to decide, is as to the competency of the testimony of Dr. Edwin A. Jones. The witness examined the testator, as a physician, in November, 1849, and swore, that at that time, from old age, or some other cause, he was totally deprived of reason—"being what he would term an idiot." It was previously proven, that his mental condition at that time was the same that it was in 1844, when the will was made. The evidence was objected to and excluded by the Court, on the ground that it was too remote.

[1.] The general principle will not be controverted, that the state of mental capacity is to be determined by the condition of the testator's mind, at the time of his executing or acknowledging the will. For notwithstanding his incapacity at a prior or subsequent time should be proved, it does not necessarily

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follow, that he was incompetent, when the will was made ; especially if the incapacity be subsequent to the execution of the instrument.

[2.] And notwithstanding, it may be true, that for the purpose of shedding light upon the state of the testator's mind when the will was made, evidence of its condition, both before and after that period, may be produced :

[3.] Still as an insulated point, we should unhesitatingly hold that proof of the imbecility of William Ward in 1849, was inadmissible to impeach a will made by him in 1844.

[4.] But here it had been already established, that the state of the testator's mind was the same in 1844, and before and after that date, that it was in 1849. This laid the foundation for the introduction of Dr. Jones' testimony. For if the testator was *non compos mentis*, in 1849, and his mind was in the same condition in 1844, when the will was made, then it follows irresistibly that the testator was incapable of disposing of his estate, when the instrument was executed. *Per se*, the proof was objectionable ; taken in connexion with the other evidence, it was relevant and proper.

[5.] We are not prepared to rule that the inquisition of lunacy, found in 1849, stands upon the same footing. Had the insanity of the testator been legally established before the will was made, its continuance would have been presumed, and the *onus* cast upon the propounders of the will, to show that the disqualification had been reversed. The maxim is, *semel furibundus semper furibundus praesumitur*. The converse of the proposition, however, or the doctrine of relation back, does not hold in such cases. The strongest objection, perhaps, to the admissibility of this judgment of lunacy is, that it is *res inter alios acta*. The record does not disclose that the propounders of the will were parties or privies to that proceeding.

[6.] As to the objections made to the instructions of the Court, we admit that they were not so perspicuous, perhaps, as they might have been. The duty of summing up, especially where the facts are numerous and complicated, as in the present case, is often difficult to discharge. It is scarcely possi-

ble for the most enlarged and experienced mind, in the "noise and confusion" of a *nisi prius* trial, to recapitulate and group together all the testimony for and against, and to lay down with precision the principles of law applicable to the facts. And when it is apparent that justice *may* have been defeated by the misapprehension of the proof or the law, by the Court, the error calls for correction as a matter of right.

[7.] If, however, taking all the instructions collectively, the law seems to have been properly expounded to the Jury, the judgment will not be reversed, though some one opinion may be erroneous. 3 *Gill. and Johns.* 450. 6 *Harr. & Johns.* 57. 7 *lb.* 147.

[8.] Now it is conceded that *fraud* is a different head of objection to the validity of a will, from importunity or undue influence. Indeed they are usually the very opposites of each other. In the one case the party is induced by imposition to do willingly the act which he performs. The mind of the testator being poisoned by the fraudulent practices which have been resorted to, so far from having his free agency controlled, he delights to use the power which he has, to cut off near and dear relations—a wife or children for instance—having the strongest natural claims upon his affection. He glories in the act, however absurd, unjust and unreasonable.

Not so with a person who has come under the power or dominion of another, and whose firmness has at last reluctantly yielded through fear, until he is made to do that which his judgment and will, if free and unconstrained, would instantly repudiate.

Fraud and importunity are equally destructive of the validity of a will made under their influence. And so the Judge, in substance, instructed the Jury, in the conclusion of his charge, the whole of which must be taken together.

It is a curious fact and one worth noting, that in the speeches of Isaeus, the master of Demosthenes, ten out of sixty-four having been preserved, and which are the most ancient monuments extant of the kind, the orator urges the claim of

kinship and blood; and hurls the bitterest reproaches against the *frauds* suggested in the procurement of wills.

It is contended that the Court should have told the Jury, upon the question of insanity, that there must be mind acting regularly; and the will, in order to be set up, should be the emanation or result of that mind.

After the somewhat elaborate *treatise* on wills, published by this Court in 1849, for which *Potts and others vs. House*, was the text, or as some may have supposed, rather the *pre-text*, we had thought that we should not be called on again for an exposition of the phrase, "sound and disposing mind and memory." How vain the hope for any Court to entertain, that principles of law can be so stated as to bid defiance to the astuteness of counsel, against whose clients these principles operate. For myself I am free to confess that I utterly despair of ever furnishing a "*supplement*" which will materially improve, much less supplant the original *work*, to which I have referred.

[9.] We have no other standard in Georgia, by which the mental capacity of a testator is to be measured than that supplied by the Common Law. By the legislation of some of the States, the inquiry must always be, whether, at the time of executing or acknowledging the will, the testator was capable of making a valid *deed* or *contract*; and no *inferior grade of intellect will suffice*. Such, however, is not the rule here. Persons of *unsound* mind are not permitted to make wills; because, as the law makes a just *post mortem* disposition of the estates of intestates, it is deemed safer that the property of such persons should, like the estates of minors, under a certain age, be distributed by law, rather than by the ostensible act of those who are necessarily the dupes of their imbecility or credulity.

[10.] The most sound and reflecting minds agree, nevertheless, that the right to the free enjoyment and disposition of one's property, is required by the best interest of society, and it will be found that the sacredness of the right has been guaranteed and guarded in exact proportion with the advancement of civilization in the world.

[11.] In *Potts and others vs. House*, (6 Ga. Rep. 324,) the

doctrine was stated as deducible from the authorities, that "*a mere glimmering of reason*" was sufficient to sustain a will. We have been requested—nay, importuned—to explain what was to be understood by this language; and we are assured that it has been grossly misapprehended and perverted. The meaning we suppose to be this:

Testaments of chattels might, at Common Law, and by the laws of this State, be made by infants of the age of fourteen, if males, and twelve, if females. This was the English rule until the Statute of I. Victoria, by which the testamentary power of infants is abolished. It is the rule here still. This, by way of illustration, we will designate as the morning dawn of reason, or the break of day of the mind, in legal contemplation. It continues to unfold and expand until it culminates to the meridian blaze of noon, when no suspicion is entertained of the competency and freedom to act of the testator. It then begins to go down until its disk disappears beneath the horizon. Still, there is the mellow glow of twilight, by which the testator is enabled to comprehend the contents of his will—the nature of the estate he is conveying to his family connexion—their relative situation to him—the terms upon which he stands with them—his own situation, and the circumstances which surround him. These and like objects, although seen by the testator as through a glass dimly, by reason of the infirmity of age, or other causes, are still contemplated, not by the flashy, fitful and evanescent glare of the *aurora borealis*; but the steady, though subdued light and illumination of the "glorious king of day," although disrobed of his gorgeous and dazzling beams. The *animus testandi*, the soul of a will, animates the form of the instrument which he has executed.

[12.] As to the complaint against the Court, for calling upon counsel in the presence and hearing of one of the Jurors, to know whether they were willing for the written instructions to be sent out to the Jury after they were charged with the case and had retired to their room, we would remark, generally, that it is irregular and improper for the Court to call upon counsel, in the presence of the Jury, *to waive any legal right whatever*. It

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is the duty of the Court to administer *justice*, according to *law*. *Berry. vs. The State*, 10 Ga. Rep. 371.

Either the Court should have delayed making the call until the Juror had retired, and if necessary have dismissed him from its presence for that purpose; or what would have been better, the whole Jury should have been brought back into the box, and the charge reiterated to them, in the presence of the parties or of their counsel.

While we would not reverse the judgment, and direct a new trial on account of this irregularity, we cannot suffer it to pass without condemning the practice.

No. 51.—THE CENTRAL BANK OF GEORGIA, plaintiff in error,
vs. ALLEN LITTLE, administrator, &c. and others, defendants
in error.

[1.] A debt due to the Central Bank of Georgia, is not, in legal contemplation, a debt due to the public, as contemplated by the Act of 1792, which will entitle it to *priority* of payment out of a decedent's estate, on general principles; but it is competent for the General Assembly to declare, that debts due to the Central Bank, shall have *priority* of payment, in the same manner as debts due to the public, and the General Assembly has so declared, by the 12th section of the amended charter of the Central Bank.

[2.] When the State of Georgia incorporated the Central Bank, and placed the public funds in that institution, to be controlled and managed by the officers thereof, she divested herself, so far as concerns the transactions of that corporation, of her sovereign character, and assumed that of a private citizen; and upon general principles was not entitled, although the sole owner of the capital stock of the bank, to claim *priority* of payment of a debt due to the bank, out of a decedent's estate.

[3.] Bills of credit, as contemplated by the 10th section of the 1st article of the Constitution of the United States, are such as are drawn or issued by the State, upon the *general credit thereof*, without the appropriation of any specific fund for the payment, or ultimate redemption of such bills.

Distribution of money, in Baldwin Superior Court. Decision by Judge JOHNSON.

The only issue in this case was, whether on the distribution of the assets of an intestate, a debt due to the Central Bank, was a debt due to the State, so as to give it a priority of lien over older judgments belonging to individuals. Judge *Johnson* held that it was not, and the counsel for the Central Bank excepted.

A. H. KENAN, for plaintiff in error.

I. L. HARRIS, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made by the record in this case, for our consideration and judgment, is, whether a debt due to the Central Bank of Georgia, shall be entitled to *priority* of payment in the distribution of a decedent's estate.

The Court below ruled, that a debt due the Central Bank was not entitled to priority of payment, on the ground that the corporation occupied the same position as a natural person, in regard to debts due to it.

The general principle upon which the decision of the Court below was based, we do not controvert.

Persons are divided by the law, into either natural or artificial persons. Natural persons are such as the God of nature formed us; artificial, are such as are created and devised by human laws, for the purposes of society and government, which are called corporations, or bodies politic. 1 *Bl. Com.* 123.

The Central Bank of Georgia is an *artificial person*, capable of *suing* and being *sued*. *Prince's Dig.* 74.

By the 10th section of the Act of 1792, the debts due by any testator or intestate, are directed to be paid by the executors or administrators, in the following order, to wit: funeral and other expenses of the last sickness; charges of probate and will, or of the letters of administration; next debts due to the *public*, &c. *Prince*, 228.

The plaintiff in error insists, that inasmuch as the State of Georgia is the sole corporator and owner of the capital stock of the Central Bank, that therefore, a debt due to the corporation is a debt due to the *public*, and entitled to *priority* of payment out of the assets of the decedent's estate.

To this general proposition, we cannot yield our assent, and if there was no other legislation in regard to this question, our judgment would be in favor of the defendant in error. When the State of Georgia incorporated the Central Bank, and placed the public funds in that institution to be controlled and managed by the officers thereof, she divested herself, so far as concerns the transactions of that corporation, of her sovereign character, and assumed that of a private citizen. In the language of Chief Justice *Marshall*, in the case of *The Bank of the United States vs. The Planter's Bank*, (9 *Wheaton's R.* 904,) "the State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a *member of a corporation*, a government never exercises its *sovereignty*. It acts merely as a corporator, and exercises no other power, in the management of the affairs of the corporation, than are expressly given by the incorporating Act."

In the case of the *Bank of the State of South Carolina vs. Gibbs*, it was held, that notwithstanding the State was the owner of the *entire stock* of the bank, a debt due to *the bank* was not a debt due to *the public*, and entitled to *priority* on that ground, but that the bank was a mere corporation, possessing the same powers and privileges of other corporations. 3 *McCord's R.* 377. Our Act of 1792, prescribing the order in which the debts of decedents shall be paid, is believed to be an exact transcript of the Executor's Act of South Carolina.

On general principles then, we hold, that when the State creates an artificial person, by an act of incorporation, for the purposes of commerce or banking, and vests her capital therein, without reserving to herself any of the rights or privileges which belong to her in her sovereign capacity, such artificial person

or corporation so created, occupies the same position in regard to the collection of its debts, as other persons, and is not entitled to any *priority* in the payment thereof, on the ground that the State is the *owner of the corporate property*. A debt due the Central Bank of Georgia, an *artificial person*, cannot properly be said to be a debt due to *the public*, as contemplated by the Act of 1792.

[2.] Thus far we have considered this question upon *general principles*, independent of the Act amending the charter of the Central Bank, passed 19th December, 1829.

By the 12th section of the amended charter, the General Assembly declare, that "in directing by the second section of the Act establishing the bank, the transfer to it of all the bonds, notes, specialties, judgments due, or to become due to the State, the General Assembly did not divest the State of any of its *rights, powers, privileges, or immunities reserved by law*, or accruing to it, in virtue of its sovereign capacity, in regard to the *collection* of the aforesaid bonds, notes, specialties, &c. further than to vest the said rights, powers, privileges and immunities, in the said president and directors. And all the *aforesaid rights, powers, privileges, and immunities*, are hereby declared to be *vested in the president and directors of the said bank*, by them to be used, enjoyed, and exercised, in behalf, and for the benefit of the State, in regard to the aforesaid bonds, notes, specialties, judgments, &c. and all notes that have been, or may hereafter be, discounted in renewal of them, in terms of the charter, and all other notes and *bills of exchange*, that have been, or *may hereafter be discounted by said bank*, in as full, perfect, absolute, and unqualified a manner as they *could have been used, enjoyed, and exercised by the State, had no such transfer been made, or such bank been established*." Prince, 77. That it was competent for the General Assembly to declare, that the debts due *the Central Bank* should be entitled to *priority* of payment in the distribution of a decedent's estate, in the same manner as debts due *the public*, cannot, we think, admit of a reasonable doubt. Why was it not within the legitimate province of the Legislature to declare that debts due the Central Bank should be paid in the same order as

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debts due the public, as it was to declare, that the funeral and other expenses of the last sickness, should first be paid? The question is not whether a debt due the Central Bank is entitled to *priority* of payment, on the ground that it is a *debt due the public*; but the question is, whether the Legislature has not declared in the 12th section of the amended charter, that debts due the *Central Bank* shall occupy the same position, as regards *priority* of payment, as the debts due *the public*.

The bonds, notes, specialties, &c. due the State, and which were transferred to the Central Bank, by the second section of the charter of 1828, were undoubtedly debts *due the public*, and if they had remained in the State treasury, would have been entitled to *priority* of payment. Before the State turned over these debts to the bank, she had the right and privilege, by law, to demand *priority* of payment thereof, out of the decedent debtor's estate. This right and privilege, is expressly conferred on the *bank*, by the 12th section of the amended charter, to be used and enjoyed, in as full, perfect, absolute, and unqualified a manner, as it could have been used and enjoyed by the State, had no transfer of the debts been made, or the Central Bank established. It is by virtue of this express enactment of the Legislature, that the debt in question (which was created long since the amendment of the charter) is entitled to *priority* of payment, and not because a debt due the Central Bank is necessarily a debt due *the public*.

[3.] It was, however, urged on the argument, that to give a debt due the Central Bank *priority* of payment, would be in effect to hold, that the capital stock of the bank belonged to the public, and that the charter authorized the issuing or admitting bills of credit within the prohibition contained in the 10th section of the first article of the Constitution of the United States, and was, therefore, void. In order to obtain a clear understanding of this view of the question, we will first ascertain what are "bills of credit," as contemplated by the Constitution? When we look into the past history of our government, we find, that many of the States issued bills upon the *general credit* thereof, which circulated as money, without appropriating any *specific*

fund for the payment or redemption of such bills. "Bills of credit," as contemplated by the Constitution, are such as are drawn or issued by the State, upon the *general credit thereof*, without the appropriation of any specific fund for the payment or ultimate redemption of such bills. In the one case, the bills are based upon the *general credit of the State alone*; in the other, the bills are based on the credit of a certain *specific fund*, specially set apart and *pledged* for the payment of the bills authorized to be put into circulation as money.

The bills authorized to be issued by the charter of the Central Bank were not based upon the *general credit of the State*, but a *specific fund* was created for the payment thereof, consisting of the money in the State treasury, not then otherwise appropriated, the shares owned by the State in other banks, and all bonds, notes, &c. due the State, as well as all the money arising from the sale of fractional lots of land, and town lots, which then belonged to the State, as well as all other debts and moneys at any time due the State. This specific fund constituted the capital stock of the bank, and was *pledged* for the payment of the bills and notes issued by the bank. The bills and notes therefore, which were authorized to be issued by the Central Bank under the charter, were not based upon the *general credit of the State*, but upon the *specific fund* specially appropriated, set apart, and *pledged* for the payment thereof; in other words, the bills were not "*emitted*" upon the *general credit of the State*, as prohibited by the Constitution. The radical defect in the argument for the defendant in error, consists in the idea, that a debt due to the Central Bank, cannot have *priority* of payment, unless it is decided to be a debt due to the *public*; and therefore, he says, if it is a debt due to the public, the capital stock of the bank belongs to the public, and the bills and notes of the bank have been issued, or "*emitted*" on the credit of the public, and the charter is within the constitutional prohibition.

To this view of the question, we answer that the charter of the Central Bank is not within the prohibition of the Constitution, for the reasons already stated; that the debt in question, is not,

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in legal contemplation, a debt due to the *public*, but that it is a debt due to *the Central Bank of Georgia*, an artificial person; that it was competent for the General Assembly to declare, that debts due to the Central Bank of Georgia, should be entitled to *priority* of payment, in the same manner as debts due to the public; and that the General Assembly has so declared in the 12th section of the amended charter, passed 19th December, 1829.

Therefore, let the judgment of the Court below be reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT AUGUSTA,
JUNE TERM, 1852.

Present—JOSEPH H. LUMPKIN, } Judges.*
HIRAM WARNER, }

No. 52.—JAMES CAMPBELL, plaintiff in error, *vs.* THE STATE
OF GEORGIA, defendant.

- [1.] While the amendments to the Constitution of the United States were *primarily* intended to be restrictive upon the powers of the General Government, and not the Legislatures of the several States—yet they are “*declaratory*” of great principles of civil liberty, which neither the national nor the State governments can infringe.
- [2.] The 6th article of the amendments to the Constitution of the United States, providing that “in all criminal prosecutions, the accused shall be confronted with the witnesses against him,” is not contravened by the admission in evidence of the *dying declarations* of the deceased, in the trial of a prisoner charged with the homicide.
- [3.] In order to make *dying declarations* admissible in evidence, the deceased must not only be actually in *extremis*, but he must believe that he is in a dying condition. And this consciousness may be inferred, not only from the statements of the party, but also from the nature of the wound, and other circumstances.
- [4.] When a *prima facie* case is made out, the evidence should be submitted

*NOTE.—Judge NISBET was detained at home by the severe illness of his wife.

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in legal contemplation, a debt due to the *public*, but that it is a debt due to *the Central Bank of Georgia*, an artificial person; that it was competent for the General Assembly to declare, that debts due to the Central Bank of Georgia, should be entitled to *priority* of payment, in the same manner as debts due to the public; and that the General Assembly has so declared in the 12th section of the amended charter, passed 19th December, 1829.

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to the Jury, it being an *issue of fact*, whether or not the declarations were made in immediate prospect of death.

- [5.] Where the evidence is contradictory as to whether or not the declarations were made with the consciousness that the declarant was *in articulo mortis*, the Court will not interfere with the verdict of the Jury and grant a new trial, especially where it is satisfied that the finding was warranted by the proof.

Indictment for murder, verdict for manslaughter, and motion for new trial, in Richmond Superior Court. Tried before Judge STARNES, January Term, 1852.

James Campbell was placed upon his trial upon an indictment charging him with the murder of Alfred Mays.

Upon the trial, the following evidence was given in before the Jury.

Testimony for the State.

John Evans, (sworn.) I knew Alfred Mays; I saw him last in January, 1851—think it was about the 23d—it was in this County. He seemed in a bad condition from wounds. I did not see the wounds then. I saw him dead; I think he died on Tuesday morning. When I got there on Tuesday morning, he was dead; I saw him alive on the evening before. Mays made these declarations in expectation of soon dying.

(Cross.) Mays said he should die, several times; said so when I first saw him. I was with him a great deal. Mays was a married man—he had a family—had three young children—think they were there. I was there three hours or more at a time. Last time, while he was alive, I stayed two or three hours; left about 12; he was talking about dying; said he should die—that he could not possibly stand it. He did not call his children around him; he said nothing to his children about his going to die and leave them.

(By Court.) From Sunday evening to Monday evening, at my visits, I heard these statements.

(By State.) About sun-rise, Tuesday morning, I returned and found him dead.

John M. Galt, (sworn.) Alfred Mays was brought to my office Sunday morning, 20th January, 1851. I found him extremely prostrated, from exposure to cold and several wounds. He had a wound on his back, just below the shoulder-blade, which was a flesh-wound—one on the chest, also a flesh-wound, and one on the abdomen, which penetrated the cavity—it was on the left side, above the hip—it was of the breadth of two inches, and depth of one—it was inflicted with a sharp instrument. It was in this County. There were other wounds—several superficial ones on the lower part of the spine, and about the knee. I am a practising physician. I saw him the next morning, about 11 o'clock; he had a blow across the right ear, I think. I did not regard either of the wounds as necessarily mortal. But for exposure to the cold, he would not, I think, have died; no vital organs were injured; the loss of blood was not great; a portion of the membrane of the intestines protruded from the abdomen. I saw him Monday, he was suffering intense pain. I was sent for on Tuesday morning—when I got there, he was dead. Had no conversation with him relative to his dying. Think he died from wounds with subsequent exposure. Did not hear him express apprehension of death.

(Cross.) I could not judge whether he had been intoxicated, or not. Don't recollect his asking me if I thought he would die. I never would have thought the wounds were sufficient to kill him. I believed he was under the influence of liquor, from the fact, that not one of the wounds would prevent his walking when he received them. I was asked if I thought he would die, by several; I never expressed the opinion that he would die. I do not know whether he could have got the blow on the head by a fall or not.

(By State.) Think the bruise was on the right side.

(By Court.) Though the prisoner might have walked, yet it is possible the blow might have prevented him from walking until his system grew torpid from effect of cold. I think the concussion produced by cold, would with liquor, have kept him still until overcome by cold.

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(By Prisoner.) I think the blow and loss of blood were sufficient to prostrate him, if drunk.

John J. R. Flournoy, (sworn.) I saw Alfred Mays one or two days before his death—think it was on Monday evening, about 4 o'clock. He was in bed—very weak—very much depressed in feeling. He said what caused his injuries. I was there but a short time. He stated that certain persons who had inflicted the wounds had threatened to kill him—that they had done it, or very nearly done it—naming the persons. Think he made no further expressions with regard to his fate. No one was weeping around him.

William Goodwin, (sworn.) I knew Alfred Mays. I saw him last on Monday after he was hurt; think it was in January, 1851, just before he died. Saw him on Sunday and Monday evenings; got there Monday about 11 o'clock, A. M., and left about 2 P. M. He was in bed; he seemed in great pain; he said so; he said he would never get over it. Don't recollect his saying what should be done after his death. He seemed in low spirits.

(Cross.) Do not know whether men are depressed when getting over a spree.

John Evans, (recalled by State.) When I went into the house on Sunday evening, I asked Mays how he was, and he replied that he was very bad off; he said he was cut all to pieces, and he believed he should die. I told him I was in hopes not. I asked him who it was that wounded him? He said, James Campbell and James Ratcliff. It was done on Saturday night, in this County, from what he told me.

[It is admitted that the assault was committed in this County, at the time charged in the indictment.]

He said that Campbell came up and struck him first, with a stick. He said he whirled and knocked Campbell down. Said that Ratcliff struck him with a stick, a blow that nearly knocked him down, and before he could recover, Campbell was cutting him with a knife and Ratcliff beating him with a stick. He said it was at night; they cut him down, and he cried out to them not to kill him; he halloed murder; they still kept beating and cut-

ting him while he was down. When they left him, they said, "now God damn you, if that hain't fixed you, you shall be fixed, or will be fixed." Mays was well acquainted with Campbell and Ratcliff.

(Cross.) I was well acquainted with Mays. In that conversation, I asked Mays if he was drunk?—he replied, "you know how I have been when I have taken a drink or two." He did not state how he got to fighting. I never was unfriendly with Campbell and Ratcliff. I believe, that in a drunken spree at Jason Watkins', four or five years ago, I did have a difficulty with James Campbell.

John J. R. Flournoy, (recalled by State.) When there, on Monday, about 4 o'clock, P. M. as I before stated, I found Mays very much depressed, confined to his bed; I asked him who had inflicted the wounds?—he replied, James Ratcliff and the prisoner at the bar, James Campbell; he told me, I think, that he was walking between Campbell and Ratcliff—Campbell on his right side and Ratcliff on his left—that Campbell rather dropped behind him, and gave him a blow with a stick on the right side of his head; he turned to return the blow, on Campbell, and Ratcliff struck him. The fight continued with sticks and knives until he found he must be overpowered, when he cried to them not to kill him, and fell. Did not say who had the stick or who had the knife. When this was stated, Mr. Evans was not present. In reply to my inquiry, why he did not use his knife, he said he did not think it necessary.

(Cross.) He did not state in relation to death, more than what I have stated. He did not intimate when he thought he would die.

William Goodwin, (recalled by State.) I was at Mays' on Monday, between 11 and 12 o'clock in the day—stayed there two or three hours. Mays said he was cut all to pieces; he said, in reply to my inquiry, who did it? Mr. Ratcliff and the prisoner at the bar, James Campbell. He said that he never would get over it; he said he and Campbell were walking together, he received a blow, as he thought, from Campbell; that he whirled around and knocked Campbell down, and before he could recover, he received a blow from a stick across the right side of

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his head, which staggered him, and before he could recover, Mr. Campbell was cutting him with a knife. He said, Mr. Ratcliff gave the second blow—that he cried out to spare life, if possible. I was not present when Mr. Flournoy and Mr. Evans were there.

(Cross.) He said it was between 8 or 9 o'clock. I might have been there two hours on Sunday morning, and about two hours on Monday. He said nothing about what was to become of his property or family when he was dead. He said he wanted Mr. Evans to attend to have these people arrested, if he died.

(By State.) Mays said he was assaulted near Mrs. Reid's gate, on the Sand hills—old Mrs. Read's, David Read's widow. That place is 100 or 150 yards from a house.

(By Prisoner.) Mrs. Campbell's is, perhaps, a mile and a quarter from the gate—don't think it is two miles.

(By State.) Mays is a man of very little property.

Samuel Read, (sworn.) I think I last saw Mr. Mays on Saturday night, between 7 and 8 o'clock, before he died, at the bridge just below the Sand-hills. Campbell was with him. Stephen Bass was along at the time. They were quarrelling a little; Campbell and Mays were both talking; they were going towards Mrs. Read's. Mays asked Campbell to go and take a drink. It was about a half a mile from Mrs. Read's. After they drank, I thought it was all over. They walked back towards Mr. Watkins' and I saw no more of them. Mrs. Read's gate lies in Mays' and Campbell's route home. That was pretty much Mays' road, after leaving the bridge, first came to Mrs. Campbell's.

(Cross.) I testified before the examining Court. I don't think Mays was drunk—think he was drinking—I heard Campbell say nothing out of the way. Mays seemed to be mad—he cursed some; he had a jug of liquor with him; he asked me to drink; I did not drink; he went to drink—I saw them take the jug; he was a little intoxicated.

(By State.) The road on which the difficulty happened is a public road, leading from town.

Seahorn Skinner, (sworn.) On Monday before his death, I

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saw Mays; I called on him—I asked him how it happened? He said, Saturday night before, he and James Campbell were coming up from Battle Row; that about the time he got between Mrs. Read's and Jesse Ansley's, he felt some person strike him; that he turned and it was Mr. Campbell; he drew back and knocked him down—before he turned round, James Ratcliff struck him with a stick and staggered him; before he recovered, Campbell commenced cutting him with a knife, and Ratcliff beating him with a stick. He said that after they had beaten him as long as they wanted to, they left him in the road till next morning. None of the witnesses who have testified, heard this statement, as I remember. He told me he thought he would die; he told me, when I bid him good-bye, that he never expected to see me in this world, and asked me to pray for him. I am a member of the Church.

(Cross.) I was there about half an hour. Said nothing about business or his family when speaking of death. Mays was a member of the Church I belonged to; he was turned out. I was not sent for. Mays had not been in family. I belong to the Methodist Church—I am class-leader.

(By State.) I left Mays' house Monday, between 11 and 12 o'clock.

(By Court.) I don't recollect where Mays said they came from, but that he and Campbell were coming up together, when they fell in with Ratcliff. Ratcliff was there when Campbell struck him.

Wilson Watkins, (sworn.) I saw Mays Sunday before his death, lying before Mrs. Read's gate; he was covered up with leaves; it was very cold; I uncovered him and asked him what was the matter? He said, he was cut all to pieces. I saw one wound on his left side. There was a great deal of blood under his left arm. It was tolerably soon in the morning. I believe that he had been lying there nearly all night, from the appearance of the place; blood had soaked in the sand. Did not examine his garments.

(Cross.) He said, Jim Campbell cut him; he said nothing about Ratcliff.

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(By Court.) He said little boys covered him with leaves.

(By Prisoner.) After my brother came up to him, he (my brother) asked him, and he said he suspicioned Jim Campbell.

(By State.) He did not speak of Ratcliff; he seemed pretty bad off; talked very little.

(By Court.) He sent Mr. Cumming's negro to let me know he was there. He got the negro to cover him.

(By State.) I carried him to Dr. Gault's.

Testimony for the Prisoner.

James Banks, (sworn.) I never heard Alfred Mays threaten James Campbell; I never said I heard him.

Philip Smith, (sworn.) I was acquainted with Mays and Campbell; I lived in the neighborhood. I know of the manner which Campbell had been treated by Mays.

Horace Brown, (sworn.) I know Mr. Mays and Mr. Campbell. I have known Mays to whip Campbell, several times. Mays was in the habit of domineering over Campbell. I was intimate with him—Mays was a violent man, weighed between 160 and 175 pounds.

(By State.) Mays struck me once; I think he struck me with his fist; I was intoxicated; I was asleep and was awaked by the blow.

(By Court.) Never knew Mays to attack any one with a weapon likely to produce death.

(By Prisoner.) I never heard it was believed that he would cut or shoot.

(By State.) I am not prejudiced towards Mays. I heard Mays say, "he intended to keep Campbell for his own whipping." Campbell was fourteen or fifteen years old at the time. Mays was his brother-in-law. I saw Mays whip Campbell once at Watkins'. Mays was not the main support of the family. Mays whipped him at Watkins' with his fist. It was two or three years before, when Mays said he intended to keep Campbell for his own whipping; he was sober. I suppose Campbell is about 24 years old.

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Elizabeth Green, (sworn.) Mr. Campbell was at our house the Saturday night of the difficulty ; I did not see him.

John Guedron, (sworn.) I passed the men the night of the difficulty, at the red hill above Battle-Row. I heard Mays say, "he had whipped Campbell, could whip him, and would whip him." I heard no more.

(By State.) It was between 7 and 8 o'clock—it was about 20 yards from the bridge—it was dark. I recognised Campbell and Mays by their voices. Did not know Ratcliff.

Anthony D. Hill, (sworn.) I never saw Mays to know him.

Nancy Campbell, (sworn.) Mr. Ratcliff and his family were at my house between 7 and 8 o'clock, on Saturday night. They stayed at my house about an hour. They lived beyond my house about three miles. They started for home ; it was dark ; they had a child—Mrs. Ratcliff carried the child.

(By State.) Mrs. Read's gate is about two miles from my house, not certain about the distance.

Susan Mays, (sworn.) I am the widow of Alfred Mays—I am the sister of James Campbell. I was at home when Mr. Mays was brought home. He would often say that he did not think he would live long, whenever he was sick ; would get up in bed of night and say he would die before morning. He had the dyspepsia ; he was dissipated in his habits ; he was very quarrelsome. He has always domineered over Campbell—was in the habit of whipping him. During his last sickness, he never took farewell of me. He said Monday, he thought he should be up ; he asked me if I thought he would be able to go to work in six months ; I replied, I hoped he would. This was on Monday evening ; don't know the time. He would not allow the children to stay in the house ; he was in the habit of swearing ; was talking sometimes about getting up ; was speaking about cutting logs for Mrs. Skinner, on Sunday night ; he said he did not know when he could cut logs, but would send Nev to cut them. Have known him to whip Campbell three or four times. Never knew Campbell to raise a fuss with any body—Mays always started it.

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(By State.) Mays would quarrel with people, tipsey or not. He got drunk every day for 12 months before he died ; he would always quarrel with Campbell when he met him in company. Last Christmas, two years ago, I saw Mays whip Campbell at our house ; Mr. Evans was there—his nephew was there. Have not seen him whip Campbell since. Both were drinking. In this last sickness, Mays said he would die—I heard the rest say he said so—did not hear him myself. Mr. Campbell did not come to our house the night of the difficulty.

James Ratcliff, (sworn.) On the night of the difficulty I was at home—I was not with Campbell—had not seen Mays that day at all.

(By State.) I think I live between two and three miles from Mrs. Campbell's. I live off the road, she lives on. I was at home all night. During the day, I was in town at work.

(By Court.) I left the stone-yard in town, little before sundown : went home in wagon, pretty near nine when I got home ; went the road by Mrs. Fox's ; I went by Mrs. Read's, stopped at Mrs. Campbell's about one hour ; my wife was with me.

(By State.) Did not see Mays or Campbell as I was going home.

William Glendening, (sworn.) I was pretty well acquainted with Mays ; knew his general character for violence ; always understood he was very quarrelsome—he wished several times to quarrel with me.

For the State.

James Watkins, (sworn.) I lived in Watkinsville. I saw Mays and Campbell as they passed up. Do not know that I saw Ratcliff ; recognised Mrs. Ratcliff's voice. Mays was not in the road when Campbell came right up ahead the wagon 20 or 30 steps ; it was after dark, between 7 and 9 o'clock. Mr. Ratcliff's wife said, " come on, James," and the wagon went on ; she spoke, I thought, to Campbell.

(By Prisoner.) Between 7 and 9 o'clock, I think, when Campbell came up and asked what was the matter, Mays gave him a very short answer.

Samuel Read, (recalled.) I did not see James Campbell at Watkins', on the Saturday night; he was above Watkins', going up the road; Mays was behind. I think I heard Mrs. Ratcliff's voice before I saw Campbell. The wagon may have been 100 yards or more behind Campbell. Did not see Ratcliff. Mays and Campbell were disputing. Don't remember hearing any thing pass between them at Watkins'. It was between 7 and 8 o'clock.

(By Court.) Mays was cursing loud enough to have been heard to the wagon.

Joseph Skinner, (sworn.) I saw three men as I was going up Saturday night; two seemed to be very angry—one, by the voice and size, I took to be Mays—the other was about the size of Campbell; the other was at a distance. I heard Mays say, I can whip you and Ratcliff both.

(By Prisoner.) Campbell is a small man. The third spoke very low. It was about half-past 7 o'clock.

(By Court.) I live about a mile from where Mays lived; knew him four or five years. It was opposite the bridge, between the plank road and Battle-Row.

When the counsel for the State in this case, had proceeded to make out the *prima facie* case, as to the state of mind and body of decedent, on the several occasions when these declarations were made, which will be found in the record of the evidence, the Court was moved by the counsel to admit such declarations. The counsel for the prisoner then gave notice, that they desired to attack these declarations, by testimony to be offered by them. The Court, thinking that a *prima facie* case had been made out, which would authorize these declarations to go to the Jury, subject to be impeached or weakened by conflicting testimony, to be introduced by the prisoner, suggested that the whole question should be submitted to the Jury, to be determined by them, under the charge of the Court. In this, the counsel for both sides acquiesced, and the whole testimony in relation thereto, was thus submitted to the Jury, and they carefully charged by the Court as to the legal principles which should

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control their determination, as to whether these declarations were uttered under the solemn sanctions necessary to make them testimony.

The Jury found the defendant guilty of voluntary manslaughter.

A motion for a new trial was made, on the ground that the verdict was contrary to law and evidence, and not sustained by evidence.

The Court refused to grant a new trial, and this decision is assigned as error.

JOHN K. JACKSON and ANDREW H. H. DAWSON, for plaintiff in error.

Attorney General SHEWMAKE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

James Campbell, convicted of manslaughter in the Superior Court of Richmond County, sues out a writ of error to reverse the judgment of the Court below, in refusing him a new trial. His application for a re-hearing, was based upon two grounds: 1st. Because the *dying declarations* of Alfred Mays, the person killed, were permitted to go in evidence to the Jury, contrary to the provision in the 6th amendment of the Constitution of the United States, entitling the accused to be confronted with the witnesses against him. And 2dly. Because these *declarations* were not admissible, for the reason, that they were not made under the consciousness of immediate death.

[1.] The first point submitted in the argument is, that death-bed declarations in cases of homicide, cannot be given in evidence, because their admission would contravene the 6th article of the amendments to the Constitution of the United States, entitling the accused in all criminal prosecutions, to be confronted with the witnesses against him. •

The answer given to this objection is, that the article in ques-

tion, applies to the United States government only, and was not intended to control the laws of the several States.

That this amendment, like the other nine adopted at the same time, was primarily introduced for the purpose of preventing an abuse of power by the Federal Government, is readily conceded. Grasping, however, as the National Judiciary is supposed to be, and studious to accumulate power in the central government, it may well be questioned, whether the limitations and restrictions imposed by these amendments, were necessary. The rights which they were designed to protect, were too sacred to be violated by any republican tribunal, legislative or judicial. A disregard of them, was mainly instrumental in overturning the Stuart dynasty in England; depriving one monarch of his head, and another of his crown. And no Court, probably, in this free country, would have ventured to enforce practices so arbitrary, unjust, and oppressive, as those inhibited by these amendments; practices condemned by Magna Charta—the Petition of Right—the Bill of Rights—and more especially, by the Act of Settlement, in Britain.

The principles embodied in these amendments, for better securing the lives, liberties, and property of the people, were declared to be the “birthright” of our ancestors, several centuries previous to the establishment of our government. It is not likely, therefore, that any Court could be found in America of sufficient hardihood to deprive our citizens of these invaluable safeguards. Still, our patriotic forefathers, out of abundant caution, super-added these amendments to the Constitution, so as to place the matter beyond doubt or cavil, misconstruction or abuse.

And the question to be decided now is, not whether these amendments were intended to operate as a restriction upon the government of the United States, but whether it is competent for a State Legislature, by virtue of its inherent powers, to pass an Act directly impairing the great principles of protection to person and property, embraced in these amendments?

That the power to pass any law infringing on these principles, is taken from the Federal Government, no one denies. But is it a part of the reserved rights of a State to do this? May the

Legislature of a State, for example, unless restrained by its own Constitution, pass a law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and petition the government for a redress of grievances?" If so, of what avail, I ask, is the negation of these powers to the General Government? Our revolutionary sires wisely resolved that religion should be purely voluntary in this country; that it should subsist by its own omnipotence, or come to nothing. Hence, they solemnly determined that there should be no church established by law, and maintained by the secular power. Now, the doctrine is, that Congress may not exercise this power, but that each State Legislature may do so for itself. As if a National religion and State religion, a National press and State press, were quite separate and distinct from each other; and that the one might be subject to control, but the other not!

Such logic, I must confess, fails to commend itself to my judgment. For let it constantly be borne in mind, that notwithstanding we may have different governments, a nation within a nation, *imperium in imperio*, we have but *one* people; and that the same people which, divided into separate communities, constitute the respective State governments, comprise in the aggregate, the United States Government; and that it is in vain to shield them from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own.

But I deem it unnecessary to pursue this line of argument and of illustration, any farther. When it can be demonstrated that an individual or a government has the *right* to do *wrong*, contrary to the old adage, that one person's *rights* cannot be another person's *wrongs*, then, and not before, will it be yielded that it is a part and parcel of the original jurisdiction of the State governments, reserved to them in the distribution of power under the Constitution, to enact laws, to deprive the citizen of the right to keep and bear arms; to quarter soldiers in time of peace, in any house, without the consent of the owner;

to subject the people to unreasonable search and seizure, in their persons, houses, papers and effects; to hold a person to answer for a capital, or otherwise infamous crime, without presentment or indictment; to be twice put in jeopardy of life or limb for the same offence; to compel him, in a criminal case, to be a witness against himself; to deprive him of life, liberty or property, without due course of law; to take private property for public use, without just compensation; to deprive the accused in all criminal trials, of the right to a speedy and public trial, by an impartial Jury; to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; to enact laws requiring excessive bail, imposing oppressive and ruinous fines, and inflicting cruel and unusual punishments!

From such *State rights*, good Lord deliver us! I utterly repudiate them from the creed of my political faith!

It was not because it was supposed that legislation over the subjects here enumerated might be better and more safely entrusted to the State governments, that it was prohibited to Congress. It was to *declare* to the world the fixed and unalterable determination of our people, that these invaluable rights which had been established at so great a cost of blood and treasure, should never be disturbed by *any* government. They feared no interference from their own local Legislatures. They determined to fetter the hands of the Federal authority, the only quarter from which danger was apprehended.

One of the reasons set forth in the preamble to these amendments, for their adoption was, that it would "extend thereby, the ground of public confidence in the government, and thus best secure the beneficent ends of its institution." *Marbury & Crawford's Digest*, 660. What confidence will be reposed in a *State* government, whose legislation should be characterized by acts which disgrace the most tyrannical epoch of the British monarchy? A free people would instantly and indignantly reject it and its authors.

The famous indictment preferred by the Grand Inquest of 1776, against George the Third, charged him, among other things, with "quartering large bodies of armed troops among the people;" and with depriving the provinces, in many cases, of "the benefits of trial by Jury;" two of the articles expressly forbidden by the amendments. It further alleged, that he had "*abolished the free system of English law in a neighboring province*, establishing therein an arbitrary government, and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same *absolute rule* into these colonies." To uphold this "free system of English law," was the great end and object of the whole of the ten amendments—but for the apparent irreverence, I would say *commandments*—which were added to the Constitution. If the foregoing acts justly branded this trans-Atlantic Prince as a tyrant, and rendered him unfit to be the ruler of a free people, republican legislators will beware how they tread in his footsteps.

While this Court yields to none in its devotion to *State rights*, and would be the first to *resist* all attempts at Federal usurpation, it feels itself called on by the blood of the many martyrs, who nobly died to maintain the great principles of civil liberty contained in these amendments—*our American Magna Charta*—to stand by, support and defend the rights which they guarantee, against all encroachments, whether proceeding from the National or State governments.

The Chancellor who delivered the opinion of the Court of Errors, in *Barker vs. The People*, (3 Cow. R. 686,) one of the cases cited in support of the position which I am combating, notices the fact, that in the Constitutions established by the different States, since the adoption of the amendments in question, provisions are inserted in reference to the same subjects embraced in the amendments. And the inference is, that the States which imposed the same restraints upon their own governments, which were contained in these amendments, gave conclusive evidence that they conceived that they were at liberty to do so or not; and that the Constitution of the Union imposed no restraint upon the State governments; and that to consider these

amendments as operative upon the several States, would be to render nugatory the like provisions in the Constitutions of many of the States.

There is plausibility in this proposition. It is a curious circumstance, however, and one worthy of remark, that the States in framing their Constitutions, have done things more strange and unaccountable than this. Many of them have imposed restraints by their Constitutions, on certain powers, over which the States are expressly forbidden to legislate, by the Federal Constitution. By the latter, for instance, it is provided that no State shall pass any *ex post facto* law. The same prohibition is contained in the Constitution of Georgia, Massachusetts, Pennsylvania, Delaware, Maryland, North and South Carolina, Kentucky, and I believe, of every State in the Union. Did these States conceive that they had the power to pass an *ex post facto* law, or not? Let this example, one only of many which might be adduced, suffice to show how utterly unsatisfactory is the course of reasoning adopted by the Court of Errors of New York.

Other precedents are cited to sustain the proposition, that none of these amendments extend to the State governments, but were intended for Congress and the United States Courts. *James vs. The Commonwealth*, 12 Serg. & Rowl. 220. *The Mayor and City Council of Baltimore*, 7 Peters, 243. I will not stop to examine these cases, or to array the conflicting opinions of Courts and Jurists, equally eminent, on the other side.

The question, I am aware, is still regarded as an unsettled one; but in this country, the weight of authority will be found in favor of the doctrine, that governments are not clothed with absolute and despotic power; but that independently of written constitutions, there are restrictions upon the legislative power, growing out of the nature of the civil compact and the natural rights of man. And that, when certain boundaries are overleaped and a law passed subversive of the great principles of republican liberty and natural justice—as for instance, taking away without cause, and for no offence, the liberty of the citizen—that it would become the imperative duty of the Courts, to pronounce such a Statute inoperative and void.

In *Fletcher vs. Peck*, (6 Cranch, 87,) Chief Justice Marshall himself says, "It may well be doubted whether the nature of society and of government, does not prescribe *some limits* to legislative power."

In *Terrell vs. Taylor*, (9 Cranch, 43,) the Court say, "We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of power in any State in the Union. On the contrary, it has been constantly resisted, as *inconsistent with first principles*."

In *Green vs. Biddle*, (8 Wheat. 1,) Mr. Justice Washington, in delivering the opinion of the Court, speaks of "*the universal law of all free governments*."

In *Wilkinson vs. Leland*, (2 Peters, 654,) the Supreme Court say, "that government can scarcely be deemed free, where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. *The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property, should be held sacred*."

In *Bonaparte vs. The Camden & Amboy R. R. Co.* (1 Baldwin's C. C. R. 223,) it was adjudged, that the Legislature has not the power to take the property of a man, for private purposes, without his consent; that if a law was clearly open to that objection, it would be a fatal one.

Now, all of these adjudications, with numerous others, to the same effect, proceed upon the fundamental principles of natural justice, independent of any constitutional restriction.

In the case of *The Regents of the University of Maryland vs. Williams*, (9 Gill. & Johnson, 365,) the Court is still more explicit. After deciding that the Act of the Legislature of Maryland, which took away the vested rights of the Regents, was void, as being in collision with the Constitution of the United States; Chief Justice Buchanan adds, "but the objection to the validity of the Act of 1825, does not rest alone for support upon the Constitution of the United States."

"*Independent of that instrument, and of any express restriction in the Constitution of the State, there is a fundamental principle of*

right and justice, inherent in the nature and spirit of the social compact (in this country at least,) the character and genius of our governments, the causes from which they sprang, and the purposes for which they were established, that rises above the restraints and sets bounds to the power of legislation, which the Legislature cannot pass, without exceeding its lawful authority. It is that principle which protects the life, liberty, and property of the citizen, from violation, in the unjust exercise of legislative power."

The Constitution of New York confers upon the Legislature of that State, the broad grant *to pass all laws* which they deem necessary and proper for the good of the State, and which shall not be repugnant to the paramount law. And yet, in *Taylor vs. Porter*, (4 *Hill's R.* 146,) Mr. Justice Bronson says, "under our form of government, the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people." And notwithstanding the general grant of power to pass *all* constitutional laws, he denied that it reached to the unwarrantable extent of taking the property of A and giving it to B, with or without compensation. "Neither life, liberty, nor property," says the learned Judge, "except when forfeited for crime, or when the latter is taken for public use, falls within the scope of this power."

It is for this reason, that the power of the Legislature, independent of any constitutional restrictions, to pass retrospective laws which shall have a *retroactive* effect, has been uniformly denied. 2 *Gallison*, 139; 1 *N. H. R.* 213; 16 *Mass. R.* 215; 7 *Johns. R.* 477.

But we do not intend to put our opinion in this case, upon this foundation, however solid it may be. For while we have denied the omnipotence of the Legislature, the tendency of our administration, nevertheless has been, to side with those who refused to declare an Act of the Legislature void, because it conflicts with the Court's views of reason, expediency or justice; and who recommend an appeal to the ballot-box as the only remedy for *unwise* legislation. And one of the strongest arguments against Judicial interposition in such cases is, that apart from a *written Constitution*, our ideas of natural justice are vague and uncertain, regulated by no fixed standard; the ablest

and best men differing widely upon this, as well as all other subjects.

But as to questions arising under these amendments, there is nothing indefinite. The people of the several States, by adopting these amendments, have defined accurately and recorded permanently their opinion, as to the great principles which they embrace; and to make them more emphatic and enduring, have had them incorporated into the Constitution of the Union—the permanent law of the land. Admit, therefore, that the Legislature of a State may be absolute and without control over all other subjects, where its authority is not restrained by the Constitution of the State or of the United States; still, viewing these amendments as we do, as intended to establish justice—to secure the blessings of liberty—to protect person and property from violence; and that these were the very purposes for which this government was established, we hold that they constitute a limit to all legislative power, Federal or State, beyond which it cannot go; that these vital truths lie at the foundation of our free, republican institutions; that without this security for personal liberty and private property, our social compact could not exist. No Court should ever presume that it was the design of the people to entrust their representatives with the power to take away or impair these securities. Such an assumption would be against all reason. The very genius, nature and spirit of our institutions amount to a prohibition of such acts of legislation, and will overrule and forbid them.

I admit, that all criminal jurisdiction rightfully belonging to any independent community, is vested in our State governments, except where, to promote the general welfare, it has been expressly delegated to the national government. To paraphrase the language of a distinguished Justiciary, the Legislature may enjoin, permit, forbid and punish; they may declare new crimes; they may, in a word, *command* what is right, and *prohibit* what is wrong, in the broadest sense; but they cannot commit political suicide, or rather *parricide*, by violating or destroying the great first principles of American civil liberty, as

set forth and declared in the ten amendments of the Constitution—a legal decalogue for every civilized society, in all time to come.

No such attempt would be considered a rightful exercise of legislative authority. To maintain that our Federal or State Legislature possess such a power, is, in our opinion, a political heresy, altogether inadmissible. The British Parliament dare not, at this day, with all its transcendental power, commit such an outrage. For such monstrosity in legislation we must go to semi-imperial France, or semi-barbarous Russia. Any attempt in this country, at this day, to establish religion; to curtail the freedom of speech or of the press; to deprive a party of the privilege of appearing personally, or by counsel; to inflict cruel or unusual punishments; to immure a prisoner without trial, in a dungeon for life; to subject a citizen to a star-chamber proceeding instead of a public trial; would shock not only the common sense, but sense of justice of the teeming millions in this free and happy country! Shame! shame! upon such legislation, would be indignantly uttered by ten thousand tongues!

No republican Legislature, I am persuaded, will ever be so forgetful or regardless of moral rectitude as to incur so severe a rebuke. Our law-makers are too deeply penetrated with a sense of duty and of justice; too profoundly imbued with moral and religious principle; too much interested in the enjoyment of that security to person and property, (the fruit of our free institutions) which these amendments provide; too indelibly impressed with the worth of these principles, by a consideration of their cost, deliberately to trample them under foot. Should the Legislature, through haste or inadvertence, pass an act at war with the spirit, object and design of our social system, as manifested in this charter, it would become the imperative duty of the Courts, however delicate the task, to vindicate the rights of the citizen, by pronouncing such a Statute invalid. This Court has been compelled more than once since its organization, reluctantly to perform this painful function.

[2.] Holding then, as we do, that the inviolability of the rule must be preserved, which, in all criminal prosecutions entitles the

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accused to be confronted with the witnesses against him, does it abrogate the Common Law principle, that the declarations *in extremis* of a murdered person, as to the homicide, are admissible in evidence? The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law. Its recognition in the Constitution was intended for the two-fold purposes of giving it prominence and permanence. The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to *him* that the privileges of an oral and cross examination are secured.

The admission of dying declarations in evidence, was never supposed, in England, to violate the well-established principles of the Common Law, that the witnesses against the accused should be examined in his presence. The two rules have co-existed there certainly, since the trial of Ely, in 1720, and are considered of equal authority.

The constant and uniform practice of all the Courts of this country, before and since the revolution, and since the adoption of the Federal Constitution, and of the respective State Constitutions, containing a similar provision, has been to receive in evidence, *in cases of homicide*, declarations properly made, *in articulo mortis*.

It constitutes one of the exceptions to the rule which rejects *hearsay evidence*. It is founded in the necessity of the case; and for the reason, that the sanction under which these declarations are made, in view of impending death and judgment, when the last hope of life is extinct, and when the retributions of eternity are at hand, is of equal solemnity as that of statements made on oath. With the policy of the rule which has been so ingeniously assailed by counsel for the accused, we have nothing to do. I will not deny but that it may be justified by that urgent necessity, which is a sufficient ground for dispensing with any rule. Chief Justice *Tilghman* thought there could not be a stronger case of necessity, than that which re-

quires the declarations of the dying victim of secret assassination to be received, in order to the detection and punishment of his murderer. Moreover, he supposed that its allowance, and the knowledge that upon it, the culprit might be condemned, would have a saving and protecting influence upon society. Still it must be admitted that great caution should be observed in the use of this kind of evidence ; and that were the point, *res integra*, much might be said against the practice.

Without dwelling longer upon this exception, we consider it settled, that *in case of homicide*, declarations by one mortally wounded and who is conscious of his condition, are admissible in evidence, both as to who was the perpetrator of the injury and the facts which attended the transaction.

[3.] The only remaining ground of objection is, that the evidence does not sufficiently show that the deceased knew or thought that his end was *near* ; and that the declarations testified to were made with the belief of death present to the mind of the declarant. That declarations, to be admissible in evidence, must be made under apprehension of immediate death, is unquestionable. The facts disclosed by the record satisfied the mind of the presiding Judge, as they do ours, that the statements were made at a time when the deceased was without hope of life, and in expectation of approaching dissolution.

The wounds were inflicted on Saturday night, the 19th of January, 1851 ; one of which was so severe as to cause a protrusion of the membranes of the intestines from the abdomen ; and in this state the deceased lay, so exposed to the bitter cold of winter, until next morning. When found, he was completely torpid, and he continued in this condition until he died—before sun-rise Tuesday morning—no re-action having taken place in his system.

John Evans testifies that he was with him a great deal during his illness, spending three hours or more at one time, on Sabbath evening. He heard him say he was very bad off ; he was cut all to pieces, and he believed he should die. John J. Flournoy swears, that on Monday afternoon, about 4 o'clock, he saw Mays. He found him very weak, and very much depressed

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in feeling. He stated that certain persons (naming them) who had inflicted the wounds, had threatened to kill him; and that they had done it—or nearly done it. William Goodwin called on the deceased, on Sunday and Monday evenings, and staid some hours with him. He was in great pain, and said he would never get over it; that he was cut all to pieces; and that he wanted Mr. Evans to attend to having these people arrested, if he died. Seaborn Skinner, a neighbor of the deceased, and known to him as a member and a class-leader of the Church, called on him on Monday. He told witness he thought he would die; and when he bid him good bye, Mays said to witness, he never expected to see him in this world again, and asked him to pray for him.

This testimony, embracing as it does, separate conversations held with different persons, at various times, at their respective interviews with the deceased, would seem to be conclusive as to the belief of the party, that he was a dying man; and that, consequently what he said to the witnesses on these occasions was properly submitted to the Jury by the Court, and with equal propriety, regarded by them as the *dying declarations* of Alfred Mays, in the full view of death and eternity as just at hand.

[4.] Is it the province of the Judge or of the Jury to decide whether the deceased thought himself dying or not, when he made the declarations inculcating the defendant?

His Honor Judge *Starnes*, after giving to this case, as he does all others which come before him, the most careful and scrupulous attention, and bringing to bear upon it that clear and discriminating judgment, patient and thorough research, which characterises all of his decisions, *held*, that the proper course to be pursued was this: that a *prima facie* case of the moral consciousness required, should be exhibited to the Court in the first instance, as preliminary to the admission of the testimony. This done, the evidence should be received and left for the Jury to determine whether the deceased was really under the apprehension of death when the declarations were made, which they might infer either from circumstances or the expressions used.

All the analogies of the law, as to proof of books, hand-

writing, &c., would seem to sanction this practice; and it is certainly in accordance with the symmetry of our Judicial system. Up to the time of Woodstock's case, decided in England in 1789, the whole subject seems to have been left to the Jury, under the direction of the Court, as a mixed question of law and fact. Since that period, it has been held there, to be the peculiar and exclusive duty of the Court, to decide whether the decedent made the declarations under the consciousness of inevitable death.

[5.] Affirming then, as we do, the doctrine of the Circuit Judge, that the condition of the deceased is to be determined by the Jury, by his statements, and by the character and nature of the injury, his appearance, conduct, &c. why should this *issue of fact* be placed upon a different footing from any other? And if there be evidence to warrant the verdict, why should it be disturbed by this or any other Court?

For myself, I must say, that the testimony satisfies me, that Alfred Mays *felt* that his departure was at hand; that he was going the way of all flesh; that he was fully sensible of the hopelessness of his condition.

On the whole, therefore, our conclusions are clearly against the prisoner, on all the grounds on which he seeks a reversal.

Judgment affirmed.

NO. 53.—GARRETT VANNES, plaintiff in error, vs. CHEESEBOROUGH, STEARNS & Co. and others, defendants in error.

[1.] Where an *ex parte* application had been made to the presiding Judge of the Court below, to sanction a petition for *certiorari*, which application was granted; but before the Court had considered and decided upon any of the grounds of error alleged in the petition, the plaintiff in error sued out his writ of error to this Court, and on a motion to dismiss the writ of error, on the ground that it had been *prematurely* sued out, the motion was allowed by the Court.

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Application for *certiorari*. Decision by Judge STARNES, 2d March, 1852.

A motion was made to dismiss the writ of error in this case, on the ground that the same was sued out to an interlocutory order, viz: the decision of Judge Starnes, in granting, *ex parte*, the writ of *certiorari*, there being as yet, no *final* decision in the cause. The errors assigned were: 1st. That the proper notices and steps were not made prior to the application for the writ of *certiorari*; and 2d. That the grounds taken for a *certiorari*, were not good in law.

JOHN K. JACKSON and A. H. H. DAWSON, for the motion.

MONTGOMERY, *contra*.

By the Court.—WARNER, J. delivering the opinion.

[1.] The defendants in error have made a preliminary motion in this case, and insist that the writ of error was prematurely sued out by the plaintiff. An *ex parte* application had been made to the presiding Judge of the Court below, for a *certiorari*, which application was granted. No *final* decision had been made by the Court, upon any of the grounds of error alleged in the petition for *certiorari*. When the Court shall consider and decide the grounds of error taken in the petition, the judgment may be in favor of the present plaintiff in error; *non constat*, that the decision will be against him, and that he will be *injured* thereby. The sanctioning the application for *certiorari* was the appropriate method of getting the question before the Court below for its decision. This case comes fully within the principles decided in *Carter and wife vs. Buchanan*, (2 Kelly, 338) and recently in the case of *Jones et al. vs. Dougherty*, decided at Cassville, during the last term of the Court, not yet reported. The writ of error must, therefore, be dismissed, having been issued prematurely.

No. 54.—WM. J. McBRIDE, administrator, &c. plaintiff in error, vs. ELIZABETH M. M. GREENWOOD and others, defendants in error.

- [1.] If, by a marriage contract, property is vested in trustees for the benefit of the husband and wife and the fruit of the marriage, and subsequently an absolute divorce is granted to the husband, the wife may, after the divorce, by proper conveyance, the trustees being parties thereto, transfer all her rights and interests, under the marriage contract, to her former husband; she being, *quoad hoc*, a *feme sole* and *sui juris*.
- [2.] The parties to a marriage contract, may, by the consent of the trustees, dispose of their own interests, under the contract. They cannot defeat the interests of remainder-men, not parties to the agreement.
- [3.] A conveyance by the former wife of all of her right, title and interest under the marriage contract, does not estop her from claiming the same property, subsequently, as the heir or distributee at law, of her child, the fruit of the marriage, who took the property in fee, under the marriage contract.

In Equity, in Richmond Superior Court. Tried before Judge STARNES, January Term, 1852.

On 26th day of June, 1828, Benjamin L. Greenwood and Elizabeth M. M. Scurry, in contemplation of a marriage about to be solemnized, entered into the following marriage settlement:

GEORGIA:

This indenture, *tripartite*, made and entered into this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and twenty-eight, and of the Independence of the United States, the fifty-second, between Benjamin Leigh Greenwood, of the County of Richmond and State aforesaid, of the first part, Elizabeth Melvina Mounger Scurry, of the County of Columbia and State aforesaid, of the second part, and George L. Twiggs and William W. Montgomery, of the County of Richmond and State aforesaid, and Benjamin Leigh of the County of Columbia and State aforesaid; (trustees of the said Elizabeth M. M. Scurry) of the third party. Whereas, Richard O

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Scurry, the father of the said Elizabeth M. M. late of the County of Richmond and State aforesaid, deceased, in and by his last will and testament, bearing date on the ninth day of November, in the year of our Lord one thousand eight hundred and seventeen, did give and bequeath unto his said daughter, the said Elizabeth M. M. the whole of his estate, both real and personal, and in and by said will, did nominate, constitute and appoint Benjamin Leigh, of Columbia County, sole executor thereof, with power to dispose of said property, in said will mentioned, in such manner as he might think proper and meet for the benefit of his said daughter. And also, in and by said will, declared, that the said property or the proceeds thereof, should not be paid over and delivered to her until she should attain the full age of twenty-one years, all which will more fully appear by reference to said recited will, remaining in the custody of the Court of Ordinary of the County of Richmond, and State aforesaid, where the same was proved and admitted to record; by virtue of which said will, she, the said Elizabeth M. M. is entitled unto all and singular the said property, real and personal, and the proceeds, rents, issues and profits thereof, according to the terms, stipulations and provisions in said will contained. And whereas, by the permission of God, a marriage is intended to be shortly had and solemnized between the said Benjamin L. Greenwood and the said Elizabeth Melvina Mounger Scurry, and it is agreed by and between the said Benjamin L. and the said Elizabeth M. M. that if the said intended marriage shall take effect and be solemnized, then, notwithstanding said marriage, he, the said Benjamin L. his executors, administrators and assigns, shall not and will not intermeddle with the said property, real or personal, nor the rents, issues and profits thereof, further or in any other manner than as is hereinafter stipulated, mentioned, and agreed upon. And whereas, the said property consists mostly of money, notes, bonds and other securities for money, and household furniture, which said property is now in the hands and under the control and direction of the said Benjamin Leigh, the executor of the said will of the said Richard O. Scurry and the

guardian of the said Elizabeth M. M. to be by him disposed of according to the direction of the said will. And whereas, it is agreed by and between the said Benjamin L. Greenwood and the said Elizabeth M. M. Scurry, that the said property and estate, goods and effects so belonging to, and being the property of the said Elizabeth M. M. in case the intended marriage shall take effect, shall not, in any event whatever, be subject or liable, either at Law or in Equity, to the payment of any of the debts of the said Benjamin L. Greenwood at present contracted, and now due, and owing or to become due, and owing by him, or any debt or debts which may be by him in future contracted and due and owing on any account, or for any purpose whatever. And it is further agreed, that the said property, money, goods and effects, whether in possession or in action, shall be secured, transferred, conveyed* and assured to the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, (trustees as aforesaid,) on the trusts and so and for the uses and trusts, intents and purposes hereafter mentioned, expressed and declared, and so and for no other trust, uses, intents or purposes, whatever. Now, therefore, this indenture witnesseth that the said Elizabeth Melvina Mounger Scurry, by and with the consent and approbation of her intended husband, the said Benjamin L. Greenwood, and also by and with the consent and approbation of her said guardian, the said Benjamin Leigh, who is also the sole executor of the last will and testament of the said Richard O. Scurry, which consent of the said Benjamin L. Greenwood and Benjamin Leigh, is manifested and declared by their being parties to these presents and signing and sealing the same, and for and in consideration of the said intended marriage and of the sum of one dollar to her in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and to the intent that the said estate, both real and personal, money, goods and effects, bonds, bills, notes and other securities for money, and the rents, issues, profits and proceeds thereof, may be secured and applied upon the trusts and to and for the uses, intents and purposes, hereinafter expressed and declared, hath

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granted, bargained, sold, aliened, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, convey and confirm unto the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, (trustees as aforesaid) and the survivor of them and the executor and administrator of the survivor of them, all the estate, real and personal, money, goods and effects, bonds, bills, notes and other securities for money, and household and kitchen furniture, and other effects which she is, or may be entitled unto, under and by virtue of the said last will and testament of her said father, Richard O. Scurry, to have and to hold the said estate, real and personal, money, goods, bonds, bills, notes and other securities for money and household and kitchen furniture and other effects, unto the said George L. Twiggs, William W. Montgomery and Benjamin Leigh and the survivor and executor and administrator of them in fee simple, upon the trusts and ~~to~~ and for the several uses, intents and purposes hereinafter mentioned and declared, and none others. That is to say, that they, the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, and the survivors of them, and the executors and administrators of the survivors of them, shall and may, by and with the consent of the said Benjamin L. and Elizabeth M. M. expend, lay out and invest the said money, goods, bills, bonds, notes and other securities for money and other property and effects, in land and negroes, or in any other property which may be agreed upon by and between all the parties to these presents; and shall and will immediately from and after the solemnization of the said intended marriage, and so soon as the said property, goods, money and effects can, according to the provisions of the said will of the said Richard O. Scurry, be paid over to them, as trustees, as aforesaid by the said executor of the said will, permit and suffer the said Benjamin L. and his intended wife, the said Elizabeth M. M. to have, hold, possess and enjoy the said land and negroes and other property, real and personal, with the appurtenances, and to receive the rents, issues and profits thereof, for the purpose of supporting and maintaining the said Benjamin L. and Elizabeth M. M. and such child or children as may be

born of the said Elizabeth M. M. during her coverture with the said Benjamin L. for and during the joint lives of the said Benjamin L. and Elizabeth M. M. and the life of the survivor of them; but upon this special understanding and agreement, by and between all the parties to this indenture, that neither the land, negroes, goods, money nor any other part or portion of the said property, real and personal, nor the rents, issues, or profits thereof, or any part or portion of them, or either of them, shall go to, or be subject, either at Law or in Equity, to the payment of any of the debts of the said Benjamin L. Greenwood already contracted, or which may be by him at any future time contracted. And that, if the rents, issues and profits of the said property, real or personal, shall, at any time, be more than sufficient to support the said Benjamin L. and Elizabeth M. M. and the child or children which may be the fruit of the said intended marriage, then such overplus shall be invested by the said trustees, in such property, real or personal, as may be agreed upon by and between all the parties to these presents, to be held by the said trustees, or the survivors of them, and the executors and administrators of such survivor, upon the same trusts, and to and for the same uses, intents and purposes hereinbefore and hereinafter mentioned and declared. And in the event of the death of the said Elizabeth M. M. Scurry, leaving a child or children, the fruit of the said intended marriage, then upon trust that they, the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, and the survivors of them and the executor and administrators of such survivor of them, and the executors and administrators of such survivor, shall and will continue to permit the said Benjamin L. Greenwood, to have, hold and keep possession of the said property, real and personal, and receive the said rents, issues and profits thereof, under the restrictions and limitations, and for the purposes hereinbefore mentioned, for the support of himself and the said child or children for and during the term of his natural life. And from and immediately after his death, then upon the further trust and confidence, that they, the said George L. William W. and Benjamin, and the survivor

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of them and the executors and administrators of such survivor, shall and will convey, transfer and set over by proper and legal conveyances, the whole and every part of the said property, real and personal, and the increase thereof, and the rents, issues and profits of the same, to the said child or children, share and share alike, in fee simple, and freely discharged from all further trusts. And in case the said Elizabeth M. M. should die in the life-time of the said Benjamin L. and without leaving a child or children, such child or children should all die in the life-time of the said Benjamin L. then upon the further trust, that they, the said George L. William W. and Benjamin, and the survivor of them, and the executors and administrators of such survivor shall and will permit and suffer the said Benjamin L. to have, hold, keep and possess all and singular the said property, real and personal, with the increase thereof, and the rents, issues and profits thereof, for his support and maintainance for and during the term of his natural life; and from, and immediately after his decease, that they shall and will convey, assign and set over all the said property, real and personal, with the increase thereof, to such person or persons and in such manner as the said Benjamin L. Greenwood shall and may order, direct and appoint, by his last will and testament, in writing, duly executed in the presence of three or more credible witnesses. And in case he should fail or neglect to make such will or appointment, then, that they shall and will convey, transfer and set over the said property, real and personal, and the increase thereof, together with the rents, issues and profits of the same, to the legal heirs and representatives of the said Benjamin L. in fee simple, share and share alike, and by proper and legal assurances. And in case the said Benjamin L. Greenwood shall die in the life-time of the said Elizabeth M. M. Scurry, leaving a child or children, the fruit of the said intended marriage, then, upon this further trust and confidence, that they, the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, and the survivor of them, and the executors and administrators of such survivor, shall and will permit and suffer the said Elizabeth M. M. Scurry, to have, hold, keep and possess

the said property, real and personal, and the increase thereof, and the rents, issues and profits of the same, under the restrictions and limitations hereinbefore named, for the support of herself and the said child or children, for and during the term of her natural life; and from and immediately after the decease of the said Elizabeth M. M. Scurry, then, upon this further trust and confidence, that they, the said George L. William W. and Benjamin, and the survivor of them, and the executors and administrators of such survivors, shall and will convey, transfer and set over by proper and legal conveyances, the whole and every part of the said property, both real and personal, and the increase thereof, together with the rents, issues and profits of the same, to the said child or children, share and share alike, in fee simple, and freely discharged from any further trust. And in case the said Benjamin L. shall die in the life-time of the said Elizabeth M. M. and without leaving a child or children, of the said marriage, or leaving a child or children, such child or children should all die in the life-time of the said Elizabeth M. M. then, upon this further trust and confidence, that they, the said George L. William W. and Benjamin, and the survivor of them, and the executors and administrators of such survivor, shall, and will, immediately upon the happening of either of the said last mentioned events, convey, assign and set over, by legal and proper conveyances, the whole of said property, real and personal, and the increase thereof, together with the rents, issues and profits of the same, to the said Elizabeth M. M. in fee simple, and freely discharged from any other trust. And the said Benjamin L. Greenwood, for himself, his heirs, executors, administrators and assigns, doth promise, covenant and agree to, and with, the said Elizabeth M. M. Scurry, and to and with the said George L. Twiggs, William W. Montgomery and Benjamin Leigh and the survivor of them, and the executor and administrator of such survivor, that they, the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, and the survivor of them, and the executors and administrators of such survivor, shall and may take, hold, keep and enjoy, all and singular the said property, real and personal, and the increase

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thereof, hereinbefore conveyed to them by the said Elizabeth M. M. upon the trusts and confidence, and to and for the uses, intents and purposes hereinbefore mentioned, expressed and declared. And that he will do no act to hinder, frustrate or defeat the true intent and meaning of these presents; and that they shall and may, hold the said property without the let, suit, trouble or denial of the said Benjamin L. his heirs, executors, administrators or assigns. And further, that he the said Benjamin L. his executors, administrators or assigns, shall and will at any time or times hereafter, upon the reasonable request of the said George L. William W. and Benjamin, or the survivor of them, or the executors and administrators of the survivor, make, do and execute, or procure, to be made done and executed, and suffer and permit his said intended wife to do, make and execute, or in conjunction with her, will do, make, and execute, as may be deemed most legal and correct, all and every such further and other reasonable and lawful act or acts, thing or things, devices and assurances in the law, whatsoever, for the further, better and more perfect conveyance, assignment and transfer of the said property, real and personal, and its increase, and the rents, issues and profits of the same unto the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, and the survivor of them, and the executors and administrators of such survivor, to and for and upon the several trusts, intents and purposes hereinbefore expressed and declared, according to the true intent and meaning of these presents, as by them or any of them, or their or any of their counsel, learned in the law, shall be reasonably devised or advised and required. And the said George L. Twiggs, William W. Montgomery and Benjamin Leigh, for themselves, their executors and administrators and assigns, do covenant, promise and agree to, and with the said Benjamin L. Greenwood and Elizabeth M. M. Scurry, that they will take, receive and accept the said property, real and personal, hereinbefore by the said Elizabeth M. M. to them conveyed, upon the several trusts, and to and for the uses, intents and purposes hereinbefore expressed and declared, and to and for no other intent or purpose whatever. And further, they

will faithfully execute and perform the said several trusts, and hold the said property, real and personal, for no other purposes than those herein mentioned and declared, according to the true intent and meaning of these presents. And it is further mutually agreed, and declared by and between all the parties to these presents, that in case the said Benjamin L. and the said Elizabeth M. M. or the survivor of them, shall be desirous to have the said property, real or personal, hereinbefore conveyed and assured, or any part thereof, sold, and the money arising from such sale invested in any other property, real or personal, stock or fund, or placed out upon any security; and shall signify such his, her or their desire, by writing under his, her or their hand, or hands, signed in the presence of two or more credible witnesses; that then, the said trustees, or the survivors of them, and the executors and administrators, or the survivor, shall, accordingly, sell and dispose of the said property, real and personal, or any part thereof, and invest, place, lay out or dispose of the money arising by the sale thereof, in such other property, real or personal, stock, funds or securities, or in such other manner as the said Benjamin L. and Elizabeth M. M. or the survivor of them, shall, by such writing as aforesaid, direct, limit, or appoint; provided, however, that the said trustees or the survivor of them, or the executors and administrators of such survivor, shall approve of and give his or their consent to such sale, purchase and investment. Which said property, real and personal, stocks, funds or securities, when so purchased, shall be transferred, assigned, conveyed, settled and assured so and in such manner as that the same, with the increase, rents, issues and profits thereof, may remain, continue and be applied and disposed of, to and for and upon the same trusts, uses, intents and purposes as the said property, real and personal, hereinbefore conveyed, are hereinbefore directed, limited and appointed, to go and be applied and be disposed, and that in all respects, according to the true intent and meaning of these presents. And in case of the death or removal of any one or all of the said trustees, it is mutually agreed by and between all the parties to these presents, that the said Benjamin L. Greenwood and Eliza-

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beth M. M. Scurry, during their joint lives, and either of them after the death of the other, shall and may nominate and appoint one or more trustees to the said property, real or personal, herein conveyed, upon the same trusts, and to and for the same uses, intents and purposes hereinbefore mentioned and declared, but such appointment shall not be made, unless by the consent of the surviving and unremoved trustees or one of them, which said appointment shall be made under the hands and seals of the said Benjamin L. and Elizabeth M. M. or the survivor of them, in the presence of two or more credible witnesses, and be attached to these presents, and form a part thereof. And in case of the death of the said Benjamin L. Greenwood and the said Elizabeth M. M. Scurry, and of any or all of said trustees, other trustees should be necessary to carry into effect the true intent and meaning of these presents, then, and in such a case, a trustee or trustees shall and may be nominated and appointed by a Court of Equity, for the purpose of carrying these presents into full effect. And whereas, the said property hereinbefore conveyed, is now in the hands of the said Benjamin Leigh, as executor of the last will and testament of the said Richard O. Scurry, deceased, to be delivered over by him, according to the provisions of the said will. Now, it is mutually agreed by and between all the parties to these presents, that when the time arrives at which the said property is to be handed over, the said Benjamin Leigh shall deliver the same to the said trustees, taking their receipt for the same, which shall be a full and complete discharge to him from the said Benjamin L. and Elizabeth M. M.—the said trustees to hold the same upon the terms and stipulations hereinbefore mentioned. In witness whereof, the parties to these presents have hereunto set their hands and affixed their seals, the day and year first above written.

Signed, sealed and
delivered in pre-
sence of us,
HENRY GREENWOOD,
NELSON CARTER,
THOMAS S. MARTIN.

BENJ. L. GREENWOOD, [L. s.]
ELIZABETH M. M. SCURRY, [L. s.]
BENJ. L. GREENWOOD, [L. s.]
GEORGE L. TWIGGS, [L. s.]
W. W. MONTGOMERY, [L. s.]
BENJ. LEIGH, [L. s.]

Subsequently, difficulties having arisen, Benjamin L. Green-

wood sued for and obtained a divorce, a *vinculo matrimonii*, from his wife, Elizabeth M. M. Greenwood. Subsequent to the divorce, Elizabeth M. M. Greenwood executed a release, of which the following is a copy:

GEORGIA:

This indenture, *tripartite*, made and entered into this twenty-eighth day of August, in the year of our Lord eighteen hundred and thirty-eight, and of the Independence of the United States, the sixty-third, between Elizabeth M. M. Greenwood, formerly Scurry, and lately the wife of Benjamin Leigh Greenwood, of the County of Baker and State aforesaid, of the first part, the said Benjamin L. Greenwood of the County of Baker and State aforesaid of the second part, and George L. Twiggs and William W. Montgomery, both of the County of Richmond and State aforesaid, (trustees of the said Elizabeth M. M.) of the third part. Whereas, heretofore, to wit, on the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and twenty-eight, a deed of marriage settlement was entered into by and between the said Elizabeth M. M. and the said Benjamin L. whereby the property belonging to the said Elizabeth M. M. was, by their consent, transferred and conveyed to the said George L. Twiggs and William W. Montgomery, and one Benjamin Leigh, (since deceased) as trustees for the said Elizabeth M. M. to and for the uses, intents and purposes, and upon the special trusts and confidence therein described and provided for, all of which will more fully appear, by reference to the said deed of marriage settlement, which will be found of record in the office of the Clerk of the Superior Court of Richmond County in the State aforesaid. And whereas, the intended marriage between the said Elizabeth M. M. and the said Benjamin L. mentioned in said marriage settlement, was solemnized between the parties on the said twenty-sixth day of June in the year of our Lord eighteen hundred and twenty-eight, and the property described in the said indenture, reduced to the possession of the said Benjamin Leigh Greenwood, by and with the consent and approbation of the said trustees. And whereas, the said Benjamin L.

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and the said Elizabeth M. M. lived together as man and wife for several years, and until the eleventh day of September, in the year of our Lord one thousand eight hundred and thirty-six, and caused the said Benjamin L. to institute in the Superior Court of the County of Baker and State aforesaid, an action at law against the said Elizabeth M. M. for a divorce, which, said action came on to be tried, and was tried, in the Superior Court of Baker County, at October, in the year of our Lord one thousand eight hundred and thirty-seven, before a Special Jury, when the following verdict was returned, pronounced and recorded, viz :

“ We find that sufficient proofs have been referred to our consideration, to authorize a total divorce, that is to say, a divorce *a vinculo matrimonii*, upon legal principles, between the parties in this case. (Signed,) THOMAS H. HULL, Foreman.

And whereas, at the second term of the said Superior Court thereafter, to wit, at the August Term, in the year of our Lord one thousand eight hundred and thirty-eight, the same cause came on to be again tried, and was tried, as the Constitution provides, before another Special Jury, when, after hearing the evidence in the case, the Jury returned the following verdict, which was received, pronounced and recorded, to wit:

“ We find that sufficient proofs have been referred to our consideration, to authorize a total divorce, that is to say, a divorce *a vinculo matrimonii*, upon legal principles, between the parties in this case. MATHEW B. MOOR, Foreman.

By virtue of which two concurring verdicts, the said Benjamin L. and Elizabeth M. M. have been divorced *a vinculo matrimonii*, and are now separate and distinct persons in law. And whereas, the said Benjamin L. being desirous to make provisions for the support and maintenance of the said Elizabeth M. M. notwithstanding the said divorce, has proposed to give her the sum of ten thousand dollars, on condition that she, with the consent and approbation of said trustees, will release

and relinquish all claim which she now has, or may at any time hereafter have to all or any and every part or portion of the property, both real and personal, mentioned, specified and contained in the said deed of marriage settlement, which proposition the said Elizabeth M. M. by and with the consent and approbation of the said trustees, the said George L. Twiggs and William W. Montgomery, has agreed to accept, which consent and approbation are manifested by their signatures to this instrument. Now, therefore, this indenture *witnesseth*, that the said Elizabeth M. M. for, and in consideration of, the sum of ten thousand dollars, to her in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath released, relinquished and quit claim, and by virtue of these presents, forever release, relinquish and quit claim unto the said Benjamin L. Greenwood all her rights, title, claim, interest or demand in Law or Equity, in and to all and every part and parcel of the property, both real and personal, of whatsoever nature or kind mentioned, specified, or in any manner contained or comprehended in the said deed of marriage settlement, and doth also freely and fully, for the consideration expressed, release and relieve her said trustees, George L. Twiggs and William W. Montgomery from all liability to her, under and by virtue of the said deed of marriage settlement. And it is further agreed and stipulated, by and between all the parties to this indenture, that the provisions and stipulations contained in the said deed of marriage settlement, shall be fully and fairly carried into effect, so far as they relate to the said Benjamin L. Greenwood and the child now in life, which is the fruit of the said marriage, to wit, the said Duncan L. Clinch and for his and their use and benefit; and that if the said Benjamin L. shall die before the said Elizabeth M. M. that the said trustees shall dispose of the said property specified in said deed of marriage settlement, for the benefit of the said child, in such manner as is mentioned and declared in said deed, as if the said Elizabeth M. M. were dead, notwithstanding she may be still in life, because the object and true intent and meaning of this indenture are to release unto the said Benjamin L. all the interest and

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claim of the said Elizabeth M. M. under the said deed and marriage settlements, she having as above expressed, received from him a full and fair consideration of the same, and to secure to the child, now in life, of the said marriage, the said Duncan L. Clinch, the whole property, after the death of the said Benjamin L. as provided and stipulated in the said deed of marriage settlement, notwithstanding that the said Elizabeth M. M. may survive the said Benjamin L. And the said Elizabeth M. M. for the consideration above mentioned, *doth hereby fully* authorize and empower her said trustees, George L. Twiggs and William W. Montgomery and the survivors of them, to dispose of the said trust property, in such manner as the said deed of marriage settlement points out and declares, in the event of the death of the said Elizabeth M. M. during the life time of the said Benjamin L. and to carry into effect all the provisions of the said deed of marriage settlement, except such as relate to the said Elizabeth M. M. whose interest under the same has been hereby fully and entirely released, to and for the benefit of the said Benjamin L. and the said Duncan L. Clinch. And the said Elizabeth M. M. doth further authorize and empower her said trustees and the survivors of them to sell any or all of the said property, real and personal, upon the application of the said Benjamin L. Greenwood, and to re-invest the proceeds thereof in such other property as he and they may think proper, as they are now authorized to do by said deed of marriage settlement, upon the joint application of the said Benjamin L. and Elizabeth M. M. and in every case to do and perform, upon the application and request of the said Benjamin L. alone, any and all such acts, matters and things as they are, by the said deed of settlement, authorized to do upon the joint application and request of the said Benjamin and the said Elizabeth M. M. And in the event of the death of the said child, Duncan L. Clinch, during the life time of the said Benjamin L. the said Elizabeth M. M. hereby covenants and agrees to and with the said Benjamin L. and the said George L. Twiggs and William W. Montgomery, that the said Benjamin L. may dispose of and devise the said property, real and personal, by his last will and testa-

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ment—or in default thereof, that the said property, real and personal, shall, after the death of the said Benjamin L. be assigned and set over by the said trustees, to his legal heirs and distributees, in such manner and form as provided for in said deed of marriage settlement, and as if the said Elizabeth M. M. were dead, notwithstanding that the said Elizabeth M. M. may still be in life.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

ELIZABETH M. M. GREENWOOD, [L. S.]

BENJAMIN L. GREENWOOD, [L. S.]

GEORGE L. TWIGGS, [L. S.]

W. W. MONTGOMERY, [L. S.]

Signed, sealed and delivered in presence,

JNO. SCHLEY, JUN.

JOSEPH STURGIS, J. I. C.

W. J. MINIS,

ROBERT G. GREENWOOD.

Benjamin L. Greenwood, in 1841, made and executed his last will and testament, in which, in the event of the death of Duncan L. Clinch Greenwood, (the issue of the aforesaid marriage) before arriving at the age of twenty-one years, and without leaving a wife, child or children, living at his death, he bequeathed all of the property included in the marriage settlement to certain legatees named in the will.

Benjamin L. Greenwood died, leaving this will unrevoked. Subsequently Duncan L. Clinch Greenwood died, before arriving at the age of twenty-one years, and without leaving a wife, child or children living at his death. Elizabeth M. M. Greenwood survived him.

George L. Twiggs, the surviving trustee under the marriage settlement, filed a bill in Richmond Superior Court, setting forth the foregoing facts; and that Elizabeth M. M. Greenwood claimed the whole of the property, as the distributee and heir at law of her son, D. L. C. Greenwood; while the legatees under the will of Benjamin L. Greenwood claimed the property under

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the said will. The prayer was that these claimants might interplead.

Upon the trial of this bill, the presiding Judge charged the Jury, among other things :

"That Mrs. Elizabeth M. M. Greenwood did not assign her right to the property described in said marriage settlement, under the Statute of Distribution of this State, but only conveyed the rights and interests which she had under the marriage settlement; and that though she had the same right under the marriage settlement which she has under the Act of 1843—or our Statute of Distribution—yet, that she, only by the instrument, (made subsequent to the divorce) assigned the right she had under the marriage settlement; that she did not assign the interest which was afterwards cast upon her by the Statute; and that as by the conveyance which she did make, she agreed that the terms of the trust under the marriage settlement should cease to operate at the death of Benjamin L. Greenwood; that as the said Benjamin L. contracted to this effect with her, that his representatives are bound by such contract; that the property did vest in Duncan L. Clinch Greenwood upon the death of his father, said Benjamin L. and remains the property of the estate of the intestate infant, and is now to be distributed to his next of kin, who Mrs. Elizabeth M. M. Greenwood is."

To this charge, counsel for William J. McBride, administrator, &c. excepted, and has assigned error as follows :

1st. That the property under the marriage settlement between Benjamin L. Greenwood and Elizabeth M. M. Scurry and their trustees, did not vest in their child, Duncan L. C. Greenwood, he having been survived by his mother, Elizabeth M. M. Greenwood, (and that E. M. M. Greenwood is not entitled to said property as the heir of her son, she having conveyed her interest to Benjamin L. Greenwood) that said property goes to and vests in the legal representatives or the legatees under the will of Benjamin L. Greenwood, deceased.

2d. That by the conveyance made subsequent to the divorce, Elizabeth M. M. Greenwood conveyed all her then and future interest, right and title in the specific property described in said mar-

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riage settlement, both in Law and Equity, to Benjamin L. Greenwood for a valuable consideration.

3d. That the Act of the Legislature of 1843, subsequent to said conveyance cannot re-invest said property in Elizabeth M. M. Greenwood.

4th. That Elizabeth M. M. Greenwood having conveyed all her then and future interest (under the marriage settlement) in said trust property, when the contingency happened, to wit, her surviving her husband and child or children of the marriage, the right she acquired under the marriage settlement upon the happening of such contingency, goes to and vests in the legal representatives or the legatees under the will of Benjamin L. Greenwood.

5th. That a contingent interest or remainder (such as E. M. M. Greenwood had under the marriage settlement) may be sold and conveyed, and such sale and conveyance will be enforced in Equity after the event has happened upon which the contingency or remainder vested.

6th. That when a trust has been declared and vested in trustees, and the trustees accept and act upon the trust, it will be enforced in Equity.

7th. That it is not in the power of the tenant for life, or other party to destroy contingent remainders before they come *in esse* and vest in the remainder-man.

G. J. & W. SCHLEY, for plaintiff in error.

C. J. JENKINS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Richard O. Scurry, in 1819, conveyed by his will, the whole of his estate to his daughter Elizabeth; and appointed Benjamin Leigh, of Columbia County, the sole executor to his will. In 1828, Elizabeth, his daughter, entered into a marriage settlement with Benjamin Greenwood, her intended husband, the provisions of which, will be referred to hereafter. A son, Duncan L. Clinch Greenwood, was the only fruit of this marriage. In

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1838, Greenwood having been totally divorced from his wife, entered into a new contract with her, relative to her interest in the trust property, the examination of which will be postponed for the present. Greenwood married again and died; having previously disposed of his property by will. The substance of which was, that should his son by the first marriage die a minor, and without issue, that the whole of the testator's property should go to the second wife and children, provided there were any. Otherwise, one-half to her, and the other half to his next of kin. In 1847, Duncan L. Clinch, the son by the first wife, died under age and unmarried. Elizabeth Greenwood, the first wife, now claims the trust estate, as the heir at law of her son. On the other hand, William J. McBride, the present husband of Greenwood's second wife, and the administrator *cum testamento annexo* upon his estate, insists that the property belongs to Greenwood's estate and should be disposed of by his will. Under these circumstances, the trustees have filed their bill of interpleader, praying the aid and direction of the Court, as to who is entitled, &c.

By the marriage settlement of 1828, it was stipulated among other things, that Benjamin L. Greenwood and Elizabeth M. M. his intended wife, should have, hold, possess, and enjoy all the property thereby conveyed, real and personal, with the appurtenances, and that they should receive the rents, issues and profits thereof, for the purpose of supporting them and such child or children as might be born to them during the coverture; and for and during their joint lives, and the life of the survivor; that in the event of the death of the said Elizabeth M. M. Scurry, leaving a child or children, the fruit of the contemplated marriage, then the trustees were to continue to permit Benjamin L. Greenwood to retain and enjoy the property for the support of himself and said offspring, should there be any, for and during the term of his natural life and from and immediately after his death, then the trustees were to convey the whole of the property with its increase, to said child or children, share and share alike in fee simple. And in case the said Elizabeth M. M. should die in the lifetime of the said Benjamin L. without bear-

ing a child or children, or such child or children should all die in the lifetime of the said Benjamin L. then the said Benjamin L. was to keep the whole of the property during his natural life, and at his death, the same to go to such person or persons, and in such manner as he might appoint by will; and should he fail or neglect to make such appointment, then the property was to go to his legal heirs or representatives in fee simple, share and share alike. And in case the said Benjamin L. should die in the lifetime of the said Elizabeth M. M. leaving a child or children, the fruit of their marriage, then the property was to go to the support of the said Elizabeth M. M. during her natural life, and at her death, to the offspring in fee. And in case the said Benjamin L. should die in the lifetime of the said Elizabeth M. M. without offspring, or leaving offspring, the same should die in the lifetime of the said Elizabeth M. M. then upon the happening of either of these two last mentioned events, the whole of the property was to go to the said Elizabeth M. M. in fee, fully discharged from trust.

The foregoing extract in substance, divested of its verbal redundancy, contains all the limitations and provisions in the marriage settlement, which appertain to the present controversy. By a careful examination of them it will be seen, that there is only one contingency in which the legatees or distributees of Benjamin L. Greenwood, can take this trust property as remainder-men, and that is, in the event of his wife's dying without children, during his lifetime, or leaving a child or children, which should die in the lifetime of the father. Upon the happening of this contingency, the trust estate was to pass, by the will of Benjamin L. Greenwood, or failing to make one, it was to go to his heirs at law.

Again, we ascertain clearly that the interest of Mrs. Greenwood was, in this trust property, merely an estate for life, with the remainder in fee, should she survive her husband and the fruit of the marriage, should there be any.

Now, it is argued, and authority is cited to sustain that position, that it is not in the power of the tenant for life, or any other party to this trust deed, to destroy the contingent remain-

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ders under it, before they come into *esse*. In other words, that it was not competent for Mr. and Mrs. Greenwood, in conjunction with the trustees under this marriage settlement, by any subsequent arrangement entered into between themselves, to defeat the limitation over to the legatees or distributees of Benjamin L. Greenwood. And we concede that this is a clear and settled rule of Chancery. And if it shall turn out that the contract of 1838 is obnoxious to this objection, it is a nullity. Let us refer to this new agreement.

Like the first, it was entered into between Elizabeth M. M. Greenwood, Benjamin L. Greenwood, George L. Twiggs, and William W. Montgomery, the surviving trustees to the former instrument. After reciting the original settlement, the marriage of the parties, as therein contemplated, and their divorce, it provides, that for and in consideration of the sum of ten thousand dollars paid by Benjamin L. Greenwood, to Elizabeth M. M. his former wife; she, by and with the consent and approbation of the said trustees, relinquishes to Benjamin L. Greenwood, all of her interest under the marriage settlement, and relieves the trustees from all further liability to her, on account thereof. It was further stipulated and agreed between the parties, that the provisions of the marriage settlement should be fully and fairly carried into effect, so far as they relate to the said Benjamin L. Greenwood and the child then in life, the fruit of the marriage, to wit: Duncan L. Clinch Greenwood, and for his and their use and benefit; and that if the said Benjamin L. should die before the said Elizabeth M. M. that the trustees shall forthwith dispose of the property mentioned in the articles, for the benefit of said child, the same as though the mother was actually dead, notwithstanding she still may be in life; it being declared to be the true intent and meaning of this new contract, for the said Elizabeth M. M. to release to Benjamin L. Greenwood all of her interest arising under the marriage settlement, in consideration of the price which he paid her for that purpose; "and to secure to Duncan L. Clinch, the child of the marriage, then in life, the whole property after the death of his father, as stipulated in the marriage settlement, notwithstanding his mother may survive

him," "and to carry into effect, *all* the provisions of the deed of marriage settlement, except such as relate to the said Elizabeth M. M. whose interest is thereby fully disposed of and parted with."

So far from there being any conflict or discrepancy between these two documents, the latter recognizes and re-affirms the former, and purports to be executed for the express purpose of fully and fairly carrying into effect, *all* of its provisions. It is manifest, that the only effect of the deed of 1838, is a sale by Mrs. Greenwood to her former husband, of all her interest in the property embraced in the marriage deed, which, as we have before seen, was a support for life, with remainder in fee, in the event of her surviving her husband and son.

[1.] Was it competent for these parties to contract with another? If they were able to do so in 1828, we see no reason why they could not in 1838. They were equally *sui juris* on both occasions. Indeed, it is assumed in the argument submitted in behalf of the plaintiff in error, and we think very properly, that by the conveyance made by Mrs. Greenwood, subsequently to her divorce, she transferred all of her present as well as prospective rights, under the marriage settlement, both in Law and in Equity, to Benjamin L. Greenwood. If the deed of 1838 is ineffectual, then Mrs. Greenwood takes this property by the express terms of the marriage agreement, she having survived both her husband and son.

What becomes then, of this interest of Mrs. Greenwood in this trust estate? Mr. McBride and those whom he represents contend, that it vests in the legal representatives of Benjamin L. Greenwood and his legatees under his will. But it is clear, that they cannot take by virtue of the marriage deed, because the only contingency upon which they could claim under that instrument, never happened, and never can happen; that is, Mrs. Greenwood's dying in the lifetime of her husband, bearing no child or children, or bearing offspring, whom their father survived.

[2.] But it is insisted, that by the deed of 1838, Greenwood, for a valuable consideration, became the owner, by purchase, of

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the contingent fee of Mrs. Greenwood; and that she having in fact, survived her son, it was competent for Mr. Greenwood to have disposed of this property by his will, which he did; and that this defeats no rights of Duncan L. Clinch Greenwood, to this property under the marriage settlement. But mark, and this is the pivot upon which this case turns, Mr. and Mrs. Greenwood, by the deed of 1838, stipulate and agree, that the true purport and meaning of that instrument was, to enable Duncan L. Clinch Greenwood, upon the death of his father, to take the whole trust property, just as though she were dead at or before that time. And thus Mr. Greenwood, as it was his privilege to do, not only deprives himself of the *jus disponendi* or right of disposing of this property by deed or will, but agrees that at his death, it shall go to his son Duncan. He did not acquire the title to this contingent fee, under the marriage settlement, but aside from it. He obtained it by purchase. He had the right, therefore, to dispose of it as he pleased. He was not trammelled by the restrictions in the marriage deed, *quoad*, this contingent estate of his former wife's. If the deed of 1838 is good, then by the terms of it, the title to the property in dispute, vested in Duncan L. Clinch Greenwood, immediately upon the death of his father.

[3.] Finally it is argued, that Mrs. Greenwood has excluded herself from any claim to this property, by the express language of the deed of 1838. True, she restrains herself from any further claim upon the *trust* property, by virtue of the *trust* deed; still this does not prevent her, of course, from taking it by purchase, inheritance, or through any other channel. She did not contract that she never would hold any of the property specified in the trust deed. There could be no motive for such a stipulation. But she sold and conveyed to Benjamin L. Greenwood, all the title which she derived to the trust property, under the marriage articles. Could not Mrs. Greenwood have bought this property, or any portion of it, from her son, had he survived? If so, she could take it by inheritance as his heir at law, as we hold she does.

Although these instruments may be deficient in that brevity

and perspicuity so much commended by *Sir Henry Sherman*, in our Saxon ancestors; still it must be admitted, that they exhibit the most indisputable proof of professional skill in the draftsman. And had the provision in the Statute of Distribution of 1804, excluding a mother from inheriting from her *last child*, not been repealed by the Act of 1843, this would have been a clear case for the plaintiffs in error. The law, as it then stood, would, upon the death of Duncan L. Clinch Greenwood, have carried this property to the next of kin on the father's side. As it is, it belongs to Mrs. Greenwood, as the statutory heir of her son.

We hold that the judgment of the Circuit Court is right, and that it ought to be affirmed.

No. 55.—QUINTILIAN SKRINE, administrator, &c. plaintiff in error, vs. JOSEPH T. SIMMONS and Wife, and others, defendants in error.

[1.] Where an executor or administrator *collusively* sells the goods of his testator or intestate, at an *under value*, when he might have obtained a higher price for them, it is a *dwastavit*, and he shall answer the *real value*; notwithstanding the object was accomplished under the form of a judicial sale by the Sheriff, under an execution obtained against the administrator in his representative capacity.

[2.] A Court of Equity will look into the whole transaction, consider the relative position and duties of the parties, and if it shall satisfactorily appear that the property of the defendant's intestate has been sold at an *under value* by his *collusion* with the plaintiff in execution, and his *active* interference on the day of sale to produce that result, he will not be permitted to shelter himself from a full discovery, under the *mere form* of a *judicial sale*.

[3.] It is not necessary to allege the commission of fraud in *totidem verbis*. If the bill states with distinctness and precision, facts and circumstances, which in themselves amount to a fraud, it is quite as unobjectionable as if the very term itself was employed.

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[4.] Fraud and damage, coupled together, will entitle the injured party to relief in any Court of Justice.

In Equity, in Burke Superior Court. Decision on demurrer, by Judge H. R. JACKSON, May 5th, 1852.

William A. Skrine, of Washington County, died intestate, and Quintilian Skrine became the administrator. Joseph T. Simmons and wife, and others, the distributees of Wm. A. Skrine, in 1851, filed their bill in Equity, in Washington Superior Court.

The bill charged, in December, 1837, or January, 1838, a valuable tract of land belonging to the estate, and known as the "Mount Ariel" plantation, was levied on by the Sheriff of said County, by virtue of a *fi. fa.* in favor of V. V. Skrine, against the said Quintilian, as administrator; that in February, 1838, the Sheriff sold the land without any notification that specie would be required, and Thomas J. Warthen became the purchaser, at the sum of \$5,500; that Quintilian Skrine was there present, and bidding, his last bid being \$5000; that after the sale, said administrator announced publicly, that specie was required, and if not promptly paid, the land would be re-sold; that the Sheriff then required specie of Warthen, who being unprepared, proposed to comply in ten days; that the land was then re-sold immediately, at Warthen's risk, the Sheriff reading a written notice signed by V. V. Skrine, (but in the handwriting of the administrator,) demanding specie or specie-paying bank bills; that Robert W. Flournoy then became the purchaser at the sum of \$5,500; that Flournoy being unprepared to pay the specie, proposed to do so in ten days, (being a man in affluent circumstances,) and to hypothecate bank stock, or any other security, for the payment of the money within that time; that the Sheriff, under the instigation of the said administrator, through V. V. Skrine, refused to comply with the offer, and again offered the land for sale, when the land was bid off nominally by V. V. Skrine, at the sum of \$3000, but really for the joint benefit of the said V. V. Skrine and the said administrator, as was evidenced by written articles of agreement between them, attached as an exhibit to the bill. The prayer was, that the administrator might be made

to account for \$2,500, with interest from the time of the sale, that being the difference between his bid and the former bids.

To this bill a demurrer was filed, on several grounds, reducable to one: That the facts charged in reference to the sale of the Mount Ariel plantation, did not render the administrator liable to account as required by the bill; he having done nothing in relation thereto, which he had not in law, the right to do.

Judge *H. R. Jackson*, to whom this demurrer was submitted, overruled the demurrer, and this decision is assigned as error.

A. J. MILLER, for the plaintiff in error, submitted the following points:

1st. The sales having been made by the Sheriff, were beyond the control of the administrator, who, therefore, is not liable for what occurred.

2d. The acts of the Sheriff were legal, and if not, he is responsible, not the administrator.

3d. A plaintiff in execution has a right to require specie of a purchaser, though no notice of the requirement be given before the sale.

4th. An administrator, as an individual, has the right to purchase for himself the property of the intestate, when sold by a Sheriff.

5th. The first and second purchasers were liable upon their bid, especially the second, for the difference between his bid and that of the last purchaser.

6th. Such liability could have been enforced by any party interested. *Cobb's Dig.* 513, 514. 5 *Ga. R.* 400.

7th. The administrator, as an individual, had good right to do what is charged in the bill; therefore, he has committed no fraud. Fraud is not charged. 5 *Ga. R.* 403.

8th. Admitting that the sale might have been set aside upon the proper suit of the heirs at law, that was the only burden under which the purchaser took the property. 8 *Ga. R.* 236.

C. J. JENKINS, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

This bill is filed by the heirs and legal distributees of William A. Skrine, deceased, against Quintilian Skrine, administrator of Wm. A. Skrine, calling upon him to account to them for the sum of twenty-five hundred dollars, which, they allege, they are entitled to recover, by reason of his *breach of duty* as such administrator, in the sale of the "Mount Ariel" plantation, the property of his intestate.

The facts charged in the bill of the complainants, upon which their equitable title to relief is predicated, are in substance: that in the early part of the year of 1838, a valuable plantation, the property of the intestate, in the hands of the defendant to be administered, known as the "Mount Ariel" plantation, in Washington County, containing about one thousand acres, was levied on by the Sheriff of the County of Washington, to satisfy a *fi. fa.* obtained against the defendant, as the administrator of the intestate, in favor of Virgil V. Skrine, the brother of the defendant; that on the first Tuesday in February, 1838, the plantation was offered for sale by the Sheriff to the highest bidder, without any special notice being given that specie, or the bills of specie-paying banks, would be required in payment. The plantation was bid off by Thomas J. Warthen, for the sum of five thousand five hundred dollars, the defendant being present, and bidding for the plantation the sum of five thousand dollars, the next highest bidder to Warthen. After the plantation was knocked off by the Sheriff to Warthen, as the highest and best bidder, the defendant publicly announced, that specie was required of the purchaser in payment, and if not promptly paid, said plantation would be re-sold at the risk of the purchaser. Warthen, the purchaser, declared, he was not then prepared to comply with the requisitions made upon him, but would do so within ten days, if that time should be allowed him; but the said plantation was forthwith offered for sale by the Sheriff, on the same day, by the *directions of the defendant*, at the risk of Warthen. When the plantation was offered for sale the second time, a written notice was handed to the Sheriff by Virgil V. Skrine, the

plaintiff in *fi. fa.* but drawn up in the *handwriting of the defendant*, to the effect that specie, or the bills of specie-paying banks, would be required in payment. At the second sale, the principal bidders were *the defendant* and one Robert W. Flournoy, and the plantation was knocked off to the latter, as the highest and best bidder, by the Sheriff, for the sum of five thousand five hundred dollars, who was well known to the defendant to be in affluent circumstances, with ample pecuniary resources, and prompt in meeting his engagements. On payment being demanded of Flournoy, he responded, that he could not immediately comply with the terms of the sale, but offered to do so within ten days, or a shorter time, and forthwith offered to hypothecate scrip for bank stock, as security for such payment within the specified time; but the Sheriff, by the *direction of the defendant*, or the said Virgil V. at the *instigation and prompting of the defendant*, declined said offer *immediately*, and on the same day, offered the plantation for sale the third time. The complainants allege, that the bidders being discouraged by the circumstances before narrated, there was little if any competition, and the Sheriff, upon *the bid of the defendant*, in the name of the said Virgil V. Skrine, but in truth and in fact, upon the *joint account*, and for the *mutual benefit of them*, the said Virgil V. and the defendant, declared said plantation sold to the said Virgil V. for the sum of three thousand dollars, being twenty-five hundred dollars less than the sum offered at each of the preceding sales, whereby, the last mentioned sum of money, as the complainants allege, was lost to them, as the distributees of the intestate's estate.

The complainants also expressly charge in their bill, that the defendant was the *principal actor* in the sale of the plantation, as before stated, and that the said Virgil V. so far as he participated in the sale thereof, acted upon the *suggestions*, and by the *advice of the defendant*; that although the said Virgil V. was the *nominal* purchaser of the property, *the defendant was the bidder*, and was by a *previous* understanding and agreement between them, *equally interested with said Virgil V. in the purchase*. The complainants further allege in their bill, that within ten days af-

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ter the sale of the plantation, *the defendant* drew up certain articles of agreement between himself and the said Virgil V. *affirming their joint and equal interest in the property*, and providing for their *joint management and enjoyment thereof*, a copy of which is attached to the complainants' bill as an exhibit; also a note signed by the defendant, in which the *copartnership* in the "Mount Ariel property" is mentioned. The articles of agreement alleged to have been drawn up by the defendant in regard to the "Mount Ariel" plantation, and providing for the mutual enjoyment thereof, between himself and the said Virgil V. recites, that it was sold under the *fi. fa.* for the sum of three thousand dollars, and bid off by the latter. In the second article of the alleged agreement, it is stipulated, that the premises shall be held in the name of the said Virgil V. by deed from the Sheriff, but that Virgil V. shall, at any time thereafter, upon the *request of the defendant*, make him such an assurance by deed, or otherwise, as shall vest in him legal and equitable titles, as tenant in common of the whole of said estate, known as the "Mount Ariel" place.

These articles of agreement were not signed by either party, but it is alleged by the complainants, that the same were drawn up *by the defendant*, and submitted by him to Virgil V. Skrine, to be executed by him. We have thus carefully referred to the main allegations contained in the complainants' bill, in order that the legal points involved in it, may be understood.

To this bill, the defendant filed a demurrer, and insists, *First*, that the sale of the property having been made by the Sheriff, was beyond the control of the administrator, who is not, therefore, liable for what occurred.

Second. The acts of the Sheriff were legal, and if not, he is responsible, and not the administrator.

Third. A plaintiff in execution has a right to require specific of a purchaser, though no notice of the requirement be given before the sale.

Fourth. An administrator, as an individual, has the right to purchase for himself, the property of the intestate, when sold by a Sheriff.

Fifth. The first and second purchasers, are liable upon their bids, especially the second, for the difference between the bid, and that of the last purchaser, and such liability could have been enforced by any party interested.

Sixth. The administrator, as an individual, had good right to do what is charged in the bill; therefore, he has committed no fraud—and fraud is not charged.

Seventh. Admitting that the sale might have been set aside upon the proper suit of the heirs at law, that was the only burden under which the purchaser took the property.

This bill, it will be observed, is not filed to *set aside the sale of the land*, nor to make the *purchasers* at the Sheriff's sale liable for the loss sustained by the complainants, in the sale of the "Mount Ariel" plantation. The complainants do not now seek to disturb the sale of the land, or to make the bidders at the Sheriff's sale, liable for the difference in price, between the first, second, and last sale. The complainants now seek to make the defendant liable, *as the administrator of the intestate*, for the loss which they have sustained, on account of his *breach of duty* as such administrator, in the sale of the "Mount Ariel" plantation; and this view of the case, disposes of the fifth and seventh grounds of objection urged by the defendant.

The main question presented by the record for our consideration and judgment is, whether the defendant as administrator, is liable to account to the complainants for the alleged loss in the sale of the "Mount Ariel" plantation?

[1.] Where an executor, or administrator, *collusively* sells the goods of his testator, or intestate, at an *under value*, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the *real value*. 2 *Williams on Ex'rs*, 1105. 1 *Comyn's Dig.* top page, 487. *Administration*, letter I, 1. 4 *Bacon's Ab.* 100. *Executors and Administrators*, letter L. 1. Lord *Redesdale* said, in *Adair vs. Shaw*, (1 *Schoales & Lefroy*, 243,) "It has been the constant habit of Courts of Equity, to charge persons in the character of *trustees* with the consequences of a *breach of trust*; and to charge their representatives also, whether they derive benefit from the breach of trust, or not."

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Lord *Thurlow*, in *Scott vs. Tyler*, (2 *Dickens' R.* 725,) held, that "fraud and covin will vitiate any transaction, and turn it to a *mere color*; if, therefore, a man concert with an executor by obtaining the testator's effects at a nominal price, or at a *fraudulent undervalue*, or by applying the real value to the purchase of other subjects for his own behoof, or in any other manner, contrary to the duty of the office of executor, such concert will involve the seeming purchaser, and make him liable to the *full value*."

[2.] Now let us examine the facts connected with the sale of the "Mount Ariel" plantation, as disclosed by the record before us, that we may determine whether the defendant, as administrator, is justly chargeable with a *breach of duty* which will make him liable to the complainants, in a Court of Equity, according to the general principles established by the authorities which we have cited. The defendant says he is not liable, because the sale was a *judicial sale*, made by the Sheriff, under execution obtained against him in his representative capacity; that the plaintiff in the execution had the *legal right* to require *specie* in payment, and that he, as an individual, had the *legal right* to purchase the property at the Sheriff's sale. Had the defendant remained *passive*, and taken no *active* part in the transaction, for the purpose of causing the property of his intestate to be sold at a *reduced price*, at the Sheriff's sale, we should not be disposed to controvert the *abstract* propositions of the defendant, although we should have watched with *scrupulous jealousy*, such a purchase made by the administrator, whose duty it was to see, that the property of his intestate was brought to sale to the best *advantage*, under the circumstances, so far as it was in his power to control them. The first question that presents itself is, did the property sell for its *full value* at the Sheriff's sale, or was it sold at an *under value*? If we take Flournoy's bid as the criterion of its value, it sold for twenty-five hundred dollars less than its *specie* value. If we take the two bids of the defendant, as the criterion of its *specie* value, the plantation was sold for two thousand dollars less than its *actual value*; for at the two first sales, he bid *five thousand dollars* for it, and finally it was bid off

by Virgil V. Skrine, the plaintiff in the execution, for *three thousand dollars*, at the third and last sale. The fact, that the plantation of the intestate was sold at an *under value*, constitutes one of the *prominent features* on the face of the record before us. Was the defendant *interested* in the purchase of the plantation bid off by his brother, the plaintiff in execution, at such an *under value*, and did he *actively* contribute to produce that result, on the day of sale? When the land was bid off by Warthen, at the first sale, *the defendant* publicly announced, that *specie* was required of the purchaser; although no notice to that effect had been previously given by the plaintiff in execution, who appears to have been present at the sale. When Warthen declared his inability to comply with the terms then required for the first time, but would do so within ten days, if that time was allowed him, the plantation was *forthwith* offered for sale by the Sheriff, *by the directions of the defendant*. When the second sale took place, written notice was handed to the Sheriff by the plaintiff in execution, that specie, or the bills of specie-paying banks would be required in payment, which notice was drawn up in the *handwriting of the defendant*. At the second sale, as well as the first, *the defendant bid for the property*. When Flournoy who bid off the property at the second sale (who was known to the defendant to be in affluent circumstances, and prompt in meeting his pecuniary engagements) offered to comply with the terms of the sale within ten days, or a shorter time, and offered to give ample security for such payment, the Sheriff, *by the direction of the defendant*, or Virgil V. his brother, *at the instigation and prompting of the defendant*, declined the offer *immediately*, and offered the land for sale the third time.

When we take into consideration the public history of the pecuniary embarrassments of the country at the time of this sale, the suspension of the banks, and the great difficulty which existed in procuring specie, or the bills of specie-paying banks, it is extremely difficult for us to reconcile *the active interference of the defendant*, in forcing this valuable property to sale in the manner stated in the record, *with his duty as administrator*, or the interests of his *cestui que trusts*, whom he represented on that occa-

sion. But we are not permitted to doubt *the motives* which prompted the active interference of the defendant, to impose *hard, onerous and unusual terms* in the sale of the "Mount Ariel" plantation, if the record speaks the truth. The complainants charge, that notwithstanding Virgil V. Skrine, the plaintiff in execution, was the *nominal* purchaser of the property at the Sheriff's sale, yet in truth and in fact, it was purchased by him upon the *joint account*, and for the *mutual benefit* of himself and the defendant, and that this was done in pursuance of an understanding and agreement, entered into between them, *before the sale*.

The articles of agreement alleged to have been drawn up by the defendant, and submitted to his brother to be executed by him, are made an exhibit, for the purpose of sustaining that charge.

[3.] But it is said, there is no *fraud* charged in the complainants' bill. Fraud, in the sense of a Court of Equity, properly includes *all acts*, omissions and concealments, which involve a *breach of legal or equitable duty, trust, or confidence justly reposed*, and are *injurious* to another, or by which an undue and unconscientious advantage is taken of another. 1 *Story's Equity*, 197, §187. The acts of the defendant in relation to the sale of the "Mount Ariel" plantation—the hard, onerous, and unusual terms imposed by his active co-operation with the plaintiff in execution, whereby the property was sold at an *undervalue* for the *joint benefit of himself* and the plaintiff, who became the *joint purchasers* thereof, to the *injury* of the distributees, constitutes, in our judgment, a breach of both *his legal and equitable duty as administrator*, in whom a *trust and confidence* had been reposed. It is not necessary to allege the commission of a fraud, *in totidem verbis*. If the bill states with distinctness and precision, *facts and circumstances*, which in themselves amount to a *fraud*, it is quite as unobjectionable, as if the very term itself was employed. *Kennedy vs. Kennedy*, 2 *Ala. R.* 604. *Story's Eq. P.* 211, §251. Our conclusion then is, from the facts and circumstances apparent on the face of this record, that the "Mount Ariel" plantation was sold at an *under value*; that the defendant *colluded* with the plaintiff in execution for his *individual benefit*, to

produce that result, and was *actively* engaged on the day of sale in furtherance of that object ; which facts and circumstances, are totally irreconcilable with his duty as administrator, and the trust and confidence reposed in him, for the protection of the rights and interests of the complainants ; that the facts, and circumstances charged and set forth by the complainants, constitute such a *fraud* upon their rights, by the defendant, as their *trustee*, in the sale of the property of the intestate, of which a Court of Equity will assume jurisdiction, and grant relief, notwithstanding the injury was inflicted, and the fraud perpetrated under *the forms of a judicial sale*. A Court of Equity will look into the whole transaction, consider the relative position and duties of the parties, and if it shall satisfactorily appear that the property of the defendant's intestate has been sold at an *under-value*, by his *collusion* and *active* interference to produce that result, he will not be permitted to shelter himself from a full discovery, under the *mere forms* of a judicial sale. A Court of Equity never will permit, in the exercise of its high, moral and appropriate functions, a party to make use of the *mere form* of a judicial sale as an *instrument*, by which the *cestui que trusts* of an executor or administrator, may be defrauded of their just rights, for the *personal pecuniary benefit* of such executor or administrator.

[4.] "*Fraud and damage* (says Chancellor *Kent*,) coupled together, will entitle the injured party to relief in any Court of justice." *Bacon vs. Bronson*, 7 *Johns. C. R.* 201. Justice to the rights of the complainants, as well as justice to the defendant requires, that the allegations relating to the sale of the "Mount Ariel" plantation, should be fully answered ; consequently, we affirm the judgment of the Court below, overruling the demurrer.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA
AT AMERICUS,
JULY TERM, 1852.

Present—JOSEPH H. LUMPKIN
HIRAM WARNER,
EUGENIUS A. NISBET. } Judges.

No. 56.—GEORGE FIELD and others, plaintiffs in error, *vs.* SEABORN JONES and JOHN SCHLEY, defendants in error.

- [1.] A bill being filed to subject certain property in the hands of a third person, to the payment of judgments in favor of the complainants, and a receiver being appointed to collect and hold the rents, issues and profits; the bill was demurred to for want of equity, and the demurrer sustained and bill dismissed: *Held*, that the functions of the receiver ceased *inter partes*, but that his amenability continued, as an officer of the Court, to the Court, and that the fund itself was subject to the order of the Court, and would rightfully return to the party as whose fund it was taken and impounded, unless retained upon a claim properly made known and presented to the Chancellor.
- [2.] *Held*, also, that a party having a claim upon a fund so situated, will be heard before the Chancellor *pro interesse suo*, upon a proper application made; and that he will pass such order as will comport with the rights of all parties in interest.
- [3.] *Held*, that a receiver is but the officer of the Court—that his possession is the possession of the Court, and that he is not subject to the process of garnishment.

Field and others *vs.* Jones and another.

In Equity, in Muscogee Superior Court. Decision by Judge POWERS, November Adjourned Term, 1851.

Seaborn Jones and John Schley filed a bill in the Superior Court of Muscogee County, charging that they were creditors by judgment, against the Southern Life Insurance and Trust Company of Florida, located beyond the limits of this State; that George Field, its former Cashier, had procured titles in himself to certain real estate in the City of Columbus, which really belonged to the said company; that Philip T. Schley, as the agent of Field, was controlling the property and receiving the rents, issues and profits. The prayer was, that the property and the rents and issues thereof, be appropriated to the payment of the debts of complainant. Afterwards, by consent, Philip T. Schley was appointed receiver to receive the rents and issues of the property.

Subsequently a demurrer was filed to the said bill for want of equity, which being overruled, was by writ of error carried to the Supreme Court—where the demurrer was sustained and the bill ordered to be dismissed. By order of the Superior Court, Philip T. Schley made return of the amount in his hands as receiver, whereupon counsel for Field moved an order, requiring Schley the receiver, to pay over to the counsel for Field, the amount in his hands. Counsel for Jones and Schley, and the receiver himself, resisted the granting of this motion, on the ground, that since the dismissal of said bill summons of garnishment had been served on the said Field by the said Jones and Schley, and also by other creditors of the Southern Life Insurance & Trust Company.

The Court refused to grant the order as moved, but passed the same, with the addition, or condition, that the assignees of Field should execute and deliver to the said receiver, a bond in the sum of fifteen thousand dollars, conditioned to refund the amount paid over by him, in the event he is made liable on the garnishment pending against him.

To this order and decision counsel for Field excepted, and this decision is assigned as error.

W. DOUGHERTY, for plaintiff in error.

BENNING & H. HOLT, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The bill, by virtue of which Mr. Schley was appointed receiver and came into the possession of this fund, was dismissed upon demurrer—the legal consequence of which was, to dispen-
se with the functions of the receiver as a depository of the parties litigant. His duties ceased with the termination of the litigation between the parties to the bill, and that ceased when it went out of Court upon the demurrer. But his relations to the Court of Chancery from which he received his appointment did not determine—his amenability to that Court as receiver, continued. That is to say, he was still an officer of the Court. His possession of the fund was the possession of the Court. Both he and it, were subject to the order of the Court. Upon the determination of the litigation for the purposes of which he was appointed, the money which he had received by natural equity, and according to the course of Chancery jurisdiction, belonged to the party, *Fields*, as whose money it had been seized and impounded. The decision on the demurrer, determining that the complainants in the bill had no equity, determined also, that the fund in question had been wrongfully placed in the custody of the receiver. This being so, it was the duty of the Chancellor to order it to be paid to *Fields* or his assignees, without conditions, unless withheld from so doing by the claim of other persons, rightfully and according to the forms of Chancery proceedings, brought to his cognizance. In accordance with these views, it seems that the assignees of *Fields*, Messrs. Iverson, Dougherty & Hargrave, exhibiting their title as such, moved the Court that the money in the hands of the receiver, Mr. Schley, be paid to them. Messrs. Jones & Schley, who are judgment creditors of The Southern Life Insurance & Trust Company, and also the receiver himself, resisted this motion, showing for cause against it, that summons of garnishment had issued in their favor and had been served upon the receiver, since the dismissal of the bill; and claim-

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ing that the money which had come into *Schley's* hands as receiver, should not be paid over to *Iverson, Dougherty & Hargrave*, but remain subject to their recovery on the garnishment. Was the service of garnishment on the receiver, sufficient to justify the Chancellor in denying the motion of the assignees of *Fields*? Was this such an exhibition of a claim upon the fund as would defeat the equitable right of *Fields*, and prevent the return of the money to him or his assignees? The presiding Judge ruled, that the money be paid to them, upon their giving bond and security to the receiver, conditioned to refund the same, in the event that he should be made liable upon the garnishment. The Judge erred in annexing the condition of the bond to refund.

[2.] That a claimant upon a fund so situated shall be heard, and that the Chancellor will protect the equitable rights of such claimant, there can be no question. According to the English practice, when a party is interested in a fund, or in property in the possession of a receiver, he can be heard before the Master, upon a proper application, *pro interesse suo*, and he will protect the rights of such party by such order as may comport with the rights of all parties, subject to the review of the Chancellor. *Story's Eq. Ju.* §§833, 891. 9 *Vesey R.* 338. 1 *Keene's R.* 749. The Chancellor here will do the same.

[3.] But he will not regard the pendency of a process of garnishment against the receiver, as such an exhibition of an interest in the fund as will justify him in passing an order to hold the fund up to await the result of that process. The receiver is not subject to garnishment. The process against him is a nullity, and the Chancellor must so regard it. If it be a nullity, then there is nothing before him which evidences a claim upon the fund; nothing to prevent the fund from taking that course which the principles of Equity give to it—that is, nothing to prevent its going back to the original owner. When there are adverse claimants upon a fund put into the possession of a receiver, whilst for the purposes of controlling the fund, the possession of the receiver is the possession of the Court; yet when the litiga-

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tion is determined, the right to the possession is in him who finally prevails. *Story's Eq. Ju.* §833. 3 *P. Williams' R.* 379.

Upon this principle it is, that when the bill was dismissed which deposited this money in the hands of *Mr. Schley*, it became, he prevailing; the right of *Fields* to have it paid over to him. There being then, I repeat, nothing before the Chancellor which would authorize any farther retention of it, he had no alternative but to order it to be paid to him or his assignees, unconditionally. The receiver is not at liberty to bring or defend actions without special leave of the Court. He is but the agent of the Court and cannot involve it in litigation. He could not defend this garnishment but by leave of the Court. If such leave were granted, it would be a descent of the Court of Chancery into a Court of Law, there to become a litigant about a fund over which it has itself jurisdiction. For the Court of Chancery, and not the receiver, would be the party. It is true, that where the question to be tried is pure matter of title to property in possession of a receiver, the Court will generally, from motives of justice and convenience, authorize a suit to be brought, taking care, however, to give such directions as will protect the possession. *Story's Eq. Ju.* §833. 9 *Vesey*, 338. 1 *Jac. & Walk.* 178. 1 *Coxe's R.* 422.

But where the question is as to the appropriation of a fund, it is not to be credited that a Court of Chancery will yield its own unquestioned jurisdiction, and take its place at the bar of a Court of Law as a party. The possession of the receiver is deemed the possession of the Court, and the Court will not permit itself to be made a suitor in a Court of Law. *Story's Eq. Ju.* §§833, 891.

Another very obvious reason why a receiver is not subject to garnishment is, that such liability would defeat the ends for which receivers are appointed. His duties as receiver would be defeated by judgments at Law on garnishment, and the beneficial jurisdiction of Chancery, in this regard, divested.

So we think the Court erred in requiring the bond to be given, and reverse the judgment.

Fields and others vs Jones and others.

No. 57.—GEORGE FIELD and others, plaintiffs in error, vs. SEABORN JONES, defendant in error. SEABORN JONES, plaintiff in error, vs. GEORGE FIELD and others, defendants in error.

[1.] A fund is in the hands of the Court, brought in by a bill in Chancery, through appointment of a receiver, which bill has been dismissed upon demurrer, upon a bill filed alleging that the complainant holds judgments which are levied upon the property out of which this fund proceeded as rent, and that a claim is interposed, and still pending at Law; and that the defendant has no other property out of which to satisfy his engagements; and that there are outstanding judgments older than his, sufficient to absorb the value of the property in *lit.*, and that he is in danger of losing his debt, unless the fund is retained to respond, if the property, on the trial of the claim is found subject: *H. M.* that a Court of Chancery will order the fund to be held up against the claim of assignees of the fund (who purchased of the claimant subsequent to the date of the complainant's judgments) to await the further order of the Court upon the result of the trial at Law.

In Equity, in Muscogee Superior Court. Decision by Judge POWERS, at November Adjourned Term, 1851. Writs of error sued out by both parties, and consolidated by consent, in Supreme Court.

Seaborn Jones filed a bill praying an injunction and the appointment of a receiver—charging in substance as follows: That the Southern Life Insurance and Trust Company, a corporation located in Florida, having certain specified claims on different persons in Columbus, one George Field, the former cashier of the said company, took in payment of the claims certain real estate situated in the said City, and instead of taking titles to the company, caused the titles to be executed to himself, paying no consideration therefor; that Philip T. Schley, as the agent of Field, was controlling the property and receiving the rents and profits thereof; that he was subsequently, by order of the Superior Court, appointed receiver, to collect and hold this fund, subject to the order of the Superior Court; and that he had, as such, collected a large amount, which he now held subject to the order of said Court; that complainant being

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the holder of bank bills of the said company, had sued out attachments thereon, returnable to the Justice's Court in the 773d District G. M., and had obtained judgments thereon, amounting to \$1,800; that these attachments had been levied on the real estate above referred to, to which Field had interposed a claim, which claim was still pending; that if the said property is found subject, that there are judgment liens older than those of complainant, that would exhaust more than this property would sell for under judgment; that the Life Insurance and Trust Company has no other property within the jurisdiction of the Courts of this State; that George Field has sold his claim to the said property since the rendition of the judgments, to Alfred Iverson, William Dougherty and George Hargraves, Jr. for the sum of \$5 or 6000, being less than the value of the *corpus* of the property, and not over two-thirds of the amount of rents now in the hands of the receiver; that these assignees were making every effort to get these funds out of the hands of the receiver, and if they succeed, will apply the same to their own use, in violation of the trust, and will thereby deprive complainant and the other creditors of all means of collecting their debts. The prayer of the bill was for an injunction, to restrain Schley from paying over the money in his hands, and also for the appointment of a receiver, to hold the funds and collect the future rents, to be subject to the order of the Court.

Upon applying for the sanction of the presiding Judge to this bill, the same was resisted by the assignees of Field, and after argument had, the Court granted an order sanctioning the bill, with the condition, that the receiver, Philip T. Schley, should pay over the funds in his hands to the assignees of Field, upon their giving bond in the sum equal to double the amount of the Justices' Court *fi. fas.* of complainant, conditioned to pay the complainant, (if the property is found subject to the attachments, on the final trial of the claim) all the rents, issues and profits of said property from the day of the levy to the final sale.

To this order and decision, both parties filed exceptions; the complainants assigning as error, that portion of the order

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allowing the funds to be paid upon bond being given; the defendants assigning as error, the sanctioning of the bill.

The two cases were heard together in the Supreme Court.

WM. DOUGHERTY, for Field and others.

H. HOLT and BENNING, for Jones.

By the Court.—NISBET, J. delivering the opinion.

[1.] This bill alleges that the complainant *Jones* is a judgment creditor of the *Life Insurance and Trust Company*, a corporation located in *Florida*; that this corporation is owner of certain real estate in this State, (the legal title to which is in one *Fields*) subject to its debts; that a levy of his judgments has been made upon this property, and a claim interposed by *Fields*, which claim is still pending; that upon a former bill filed, one *Schley* was appointed receiver to collect and hold the rents of this property, and that as such receiver he did collect, and now holds a large sum of money; that the former bill was dismissed on demurrer; that if the property is ultimately subjected as the property of the *Life Insurance and Trust Company*, the full amount which it will bring at Sheriff's sale, will not be more than sufficient to satisfy other judgments older than his, outstanding against that Company, and that unless this fund in the hands of the receiver is held up, to be applied to his judgments, he is in danger of losing his debt; that said Company has no property other than that above referred to, within the jurisdiction; that *Fields* himself resides without the jurisdiction of the State, and has sold his interest in said property to Messrs. Dougherty, Iverson and Hargrave, since the rendition of his judgments, who are making every effort to get this fund out of the hands of *Schley*, the receiver. It prays that *Schley* be enjoined from paying the money in his hands to these assignees of *Fields*, and that a receiver be appointed to hold it and collect the future rents, subject to the order of the Court. Upon applying for a sanction to this bill, it was resisted by the

assignees of Fields. The Judge sanctioned the bill upon terms, requiring the money to be paid to the assignees of Fields, upon their giving bond and security to pay to the complainant, Jones, all the rents, issues and profits of the property, from the time of Jones' levy, until it was finally sold, if the property should be found subject to Jones' judgments, on the final trial of the claim. To this ruling, both parties excepted and brought writs of error, which, by order of this Court, upon consent of the parties, are now considered together. Col. Jones insists that the Court erred in ordering the money to be paid to Messrs. Dougherty, Iverson and Hargrave at all—holding that his bill ought to have been sanctioned unconditionally, according to its prayer—whilst they insist, that the Court erred in sanctioning the bill at all, and that they were entitled to the money unconditionally. For the better understanding of this case, I refer to the case of *George Fields and others vs. Seaborn Jones and John Schley*, immediately preceding this. This fund is the same that *Messrs. Dougherty, Iverson and Hargraves* sought to be paid to them in that case, and which *Jones and Schley* resisted, upon the ground of a pending garnishment in their favor against the receiver. Then we held that it was the duty of the Court to order the money to be paid to Fields, or his assignees, as whose money it was, under the dismissed bill originally taken, and impounded in the hands of Mr. Schley the receiver; unless withheld from so doing by the claim of some party properly brought to the cognizance of the Chancellor. The service of the garnishment, we held insufficient to restrain him from so doing. We held that this fund was in the custody of the Court, and that any person claiming an interest therein could be heard, *pro interesse suo*, as before the Master in England, and that when heard, the Chancellor would pass such order as would comport with the interests of all parties. The bill now before us is not, as was claimed for it in the argument, a creditor's bill, seeking the appropriation of a fund to the satisfaction of a debt. It asks no such appropriation. It invokes the aid of Chancery to hold up a fund, upon which the complainant will have a right to go for the satisfaction of his judgments, if upon the final decision of the claim

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at Law, the property out of which it has issued as rents and profits, is found subject. It seeks to accomplish this, by restraining the present receiver from paying it over, and by the appointment of another receiver to hold it until the termination of the litigation at Law.

As a basis for these demands, it exhibits judgments in favor of the complainant upon attachment—a levy upon the property, out of which this money issued—a pending claim at Law by Fields—the fact of the non-residence of the corporation, who is defendant in his judgments—the further fact that there is no other property to be reached within the jurisdiction, and that older judgments are outstanding against the corporation, in amount large enough to cover the full value of the property itself, and that efforts are making to cause this fund to be paid over to purchasers of the same from Fields, whose title is junior to his judgments. From the case made, the complainant has judgment levies which may attach upon the property, and if so, he will have a legal right of satisfaction out of the proceeds of that property now in the hands of the Court, and the payment of which will be endangered, unless those proceeds are retained. It is a case in which Equity must give relief, or justice and right be violated. No legal remedy is now at the command of the complainant. Garnishment will not, as already decided, reach the case; and conceding that if this money is paid to the assignees of Field, an action would lie in his favor against them, in the event that the property is made subject to his judgments, yet that is not a *present* remedy, and may not *then* be a complete remedy. Besides Equity having jurisdiction over this fund now, will not, under these circumstances, fail to exercise its preventive power, and thus avoid future suits. The right to this money, as between the complainant and the assignees of Fields, depends upon the title to the property in litigation at Law, and upon principles *quia timet*. A Court of Equity will, having the fund, reserve it, subject to its own future order. The injunction is only necessary to prevent its passing wrongfully, before the Court acts, out of the hands of its officer. (*See Story's Eq. Ju.* §907.) Our judgment is that the judgment of the Court below

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be reversed—that a receiver be appointed to take and sell the amount he is hereby authorized to receive, and to collect and hold the future rents, issues and profits of the property; and that so much of the fund now in the hands of *Mr. Schleg*, as, together with the future income of the property, will be, in the judgment of the Chancellor, sufficient to pay the principal and interest due on the judgments on attachment in favor of *U. J. Jones*, at the determination of the claim case, and also his costs thereon, be paid by *Mr. Schleg* to the newly appointed receiver, and that the balance in the hands of *Mr. Schleg* be paid by him immediately to *Messrs. Dougherty, Irwin and Huggins*, the assignees of *Folds*.

No. 58.—*JOHN W. BROOKS and others, plaintiffs in error, vs. CHARLES ROONEY and another defendants in error*

- [1.] If the principal Sheriff executes a deed in conformity with a sale made by one who claims to act as deputy, this is a recognition of the deputy's authority and a ratification of his act and is sufficient to protect the purchaser's title, had the deputy acted without any regular appointment.
- [2.] The acts of a deputy, *de facto*, are good as to *third persons*.
- [3.] Tax Collectors' sales and all others made under summary proceedings and special powers, and by order of Courts of limited jurisdiction, must show upon their face that the prerequisites of the law have been strictly pursued. It is otherwise of sales made by Sheriffs under the judgment and execution process of Courts of general jurisdiction.
- [4.] To the purchaser who pays his money and receives the Sheriff's deed, it is a matter of no consequence whether the return of the execution be imperfect or not made at all; the irregularity or omission cannot affect the validity of his title.
- [5.] The purchaser at Sheriff's sale, depends upon the "judgment, the levy and the deed; all other questions are between parties to the judgment and the officer." It is sufficient for the purchaser that the Sheriff had competent authority, and sold and executed to him a title. The title of a purchaser at Sheriff's sale is not created by, nor dependent on, the return, but is derived from the previous sale made by the Sheriff, by virtue of his writ.

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- [6.] The Acts which make it the duty of the Sheriff to advertise the sale of property in a particular way, and to sell between certain hours of the day, are merely directory to the officer. His neglect to observe these directions may subject him to a suit for damages, at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the Sheriff.
- [7.] A purchaser at Sheriff's sale has a right to presume that a public officer, known to possess the power to sell, has taken every previous step required of him by the law, under which he sells.
- [8.] Where a judgment has been obtained, and an execution has issued in the lifetime of the defendant, his subsequent death will not arrest the collection of the debt by levy and sale of the intestate's property, notwithstanding his heirs at law are *minors* and no administration has been granted upon the estate.

Ejectment, in Muscogee Superior Court. Tried before Judge POWERS, at November Term, 1852.

The heirs at law of Martin Brooks, deceased, brought suit for a lot of land in Muscogee County. The defendants claimed under a Sheriff's sale of the land, as the property of Martin Brooks.

The defendants on the trial offered in evidence a deed made by John C. Mangham, as Sheriff, reciting that by virtue of a *fi. fa.* issued from the Inferior Court of said County, (of Muscogee) at the suit of James C. Leonard against Martin Brooks, he had lately seized, (this tract of land,) and after being advertised according to law, he did, on the sixth day of June, in the year of our Lord 1843, at the place of public sales in the said County of Muscogee, expose the same at public outcry, when Kenneth McKeagie, &c."

Also, a *fi. fa.* from the Inferior Court of said County, in favor of James C. Leonard against Martin Brooks, upon which there was entered a levy on this tract of land, signed by "Theobald Howard, D. Sheriff." Also, a return of the sale and the disposition of the proceeds, which was signed by no person.

Plaintiffs' counsel objected to the admission of the deed in evidence because it was made by John C. Mangham, and the levy was made by Theobald Howard, D. Sheriff, and there was no

evidence that he was, or acted as Deputy Sheriff. *Also*, because it did not appear in said deed, nor was there any evidence that the said sale was advertised at the Court house door and two or more public places, and was made between the hours of ten o'clock, A. M. and four o'clock, P. M. as required by law.

All of which objections, the Court overruled, and plaintiffs' counsel excepted.

Plaintiffs' counsel also objected to the *fi. fa.* going in evidence, on the ground that it did not appear, nor was there any proof that the lot in dispute was sold, as there was no date or signature to the entry making a return of the sale. All which objections the Court overruled, and this decision was excepted to by counsel for plaintiffs.

Plaintiffs' counsel requested the Court to charge the Jury, that if they believed from the evidence, that at the time of the levy and sale, Martin Brooks, the defendant in *fi. fa.* was dead, and there was no representation upon his estate, and the heirs were all minors, the sale was void.

The Court refused so to charge, and plaintiffs excepted.

On these exceptions error is assigned.

W. DOUGHERTY, for plaintiffs in error.

WILEY WILLIAMS, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of ejectment, brought by the heirs at law of Martin Brooks, deceased, to recover lot No. 134, in the City of Columbus. The plaintiffs proved on the trial, that they were the children and only heirs of the decedent, who died in possession of the premises in dispute, and who had lived thereon for several years previous to his death; that the rent of the lot was worth \$100 per annum, and that the defendants were in possession at the time the suit was instituted.

[1.] The testimony being closed on the part of the plaintiffs, the defendants offered in evidence a deed from the Sheriff of

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Muscogee County, for the property, together with the original *fi. fa.* and entries thereon, under which it was sold. The deed was objected to, on the ground that it was made by John C. Mangham, as Sheriff, when the levy on the execution was endorsed by Theobald Howard, as Deputy Sheriff; and there was no proof to show that Howard, who made the levy, was the deputy of Mangham, who conveyed the title. It was farther objected to the deed, that it did not appear from its recitals, nor was it established by *aliunde* proof, that the sale of the lot was advertised at the Court house door, and two or more public places in the County; and that the sale was made between 10 o'clock, A. M. and 4 o'clock, P. M. as the Statute requires.

The execution was objected to for the reason, that it did not appear from the entry thereon, nor was there any other legal proof of that fact, that the lot in controversy had been sold at all, as there was no date nor signature by the officer to the entry of sale on the *fi. fa.* The defendants' counsel, to obviate this alleged omission, proved that the endorsement of sale, as well as the distribution of the proceeds, was in the handwriting of Theobald Howard, the Deputy Sheriff. The Court admitted the testimony, and to this decision counsel for the plaintiffs excepted.

[1.] The return of the levy and sale of this land is made by Theobald Howard, as Deputy Sheriff. The deed is made by John C. Mangham, as Sheriff. This is a recognition of the Deputy's authority, and a ratification of his act. And this would have been sufficient to protect the purchaser, had Howard acted without any regular appointment.

[2.] The acts of a deputy *de facto*, are good as to third persons. 1 *Hawks*. 329. 10 *N. H. Rep.* 167. 4 *Ala. R.* 527. 5 *Ibid*, 295. 9 *Mass. R.* 231. 10 *Ibid*, 290. 15 *Ibid*, 180. 5 *Pick. R.* 487. 5 *Smed. & Marsh.* 573.

[3.] The next complaint is, that it does not appear, either by the recitals in the deed itself, or by extrinsic proof, that the land was advertised and sold according to law.

The deed recites that John C. Mangham, the Sheriff, seized the lot as the property of Martin Brooks, and after being advertised according to law, that he did, on the 4th day of June,

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1843, at the place of public sales in said County expose the same at public outcry.

The case of *Clements against Henderson*, (4 Ga. R. 148,) is relied on as authority for the plaintiff in error. That was an *administrator's* deed, and the two cases are consequently clearly distinguishable. In cases of sale under special power, as that of a Tax Collector, and by order of Courts of limited jurisdiction, as Courts of Ordinary, the execution of the power must show upon its face, that the Statute has been strictly complied with. But it is otherwise with sales made by Sheriffs under judgments of Courts of general jurisdiction. *Muric vs. The President and Selectmen of Natchez*, 4 *Smedes & Marshall*, 602. L

[4.] This reasoning applies to the third exception, namely: that it did not appear from the entry itself on the *fi. fa.* nor was there any proof that the lot in litigation was sold, as there was no date nor signature to the entry on the *fi. fa.* It was shown that the endorsement of the sale and of the distribution of the proceeds, was in the handwriting of Theobald Howard, who made the sale.

But independently of this, the errors of omission or of commission on the part of the Sheriff, especially after the sale is made, and over which the purchaser has no control, cannot affect the validity of his title. Whether the return of the execution be imperfect or not made at all, is a matter of no consequence to the purchaser, who pays his money and receives the Sheriff's deed. 7 *Block. R.* 154. 1 *Johns. Cases*, 153. 8 *Yerger*, 179. In *Sullivan & Price vs. Hearndon*, (11 Ga. R. 294,) this Court expressed the opinion, that if the Sheriff has authority to sell property, a failure in the performance of any part of his duty, and for which he would be compelled to indemnify the party aggrieved, to the extent of the injury received, would not destroy the title of an innocent purchaser.

[5.] And the conclusion to be derived from a full review of all the adjudged cases, is that which is briefly announced by the Supreme Court of the United States, in *Wheaton vs. Sexton*, (4 *Wheat. R.* 503,) namely: that "the purchaser depends upon the judgment, the levy and the deed," and that "all other questions

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are between the parties to the judgment and the officer." See also, 3 *Wash. C. C. R.* 546. 4 *Rand.* 427. 4 *Wend.* 462. 2 *Bibb*, 401. 3 *J. J. Marshall*, 439. 1 *Nott & McCord*, 11. *Dem ex Dem. Osborne vs. Woodson Hay, N. C. R.* 24. 1 *Murph. Law and Equity R.* 311.

[6.] In this last case cited, the Supreme Court of North Carolina held, that the Statutes of that State, which made it the duty of the Sheriff to advertise the sale in some newspaper printed in the State, and at three public places in the County, and set forth the names of the owners of the lands, the water-courses on which the lands are situated, &c. are merely directory to the Sheriff in the discharge of his duty; that his neglect to observe these directions may subject him to a suit for damages at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the Sheriff; and in delivering its opinion, the Court very properly suggests, that a contrary doctrine would so embarrass sales of this kind, and throw so many difficulties in the way of persons willing to bid a fair price for the property, that they would not be willing to purchase. For it would not only be necessary to prove these facts on any particular occasion, but they must preserve the evidences of them with their titles, to be used at any distant period whenever these titles might be made the subject of controversy. The consequences would be, that property would become a subject of speculation merely by those who would, by purchasing at very reduced prices, only be willing to encounter the inconveniences and risks of purchasing under these embarrassing circumstances.

[7.] We believe this to be sound doctrine, and that although the failure in the performance of any part of the Sheriff's duty, might subject him to an action, in which he would be compelled to indemnify the owner of the land which might be irregularly sold, or the creditor to the extent of the injury received by such sale, yet it would not destroy the title of the purchaser, who has a right to presume that a public officer, known to possess the power to sell, has taken every previous step required of him by the law under which he sells.

I am aware that authorities may be found which seem to be in conflict with this doctrine ; and which hold that the return of the officer is a necessary part of the title, and must show a strict compliance with the requirements of the Statute ; and that the return must set out all the facts, in order that the Court may judge whether the sale is legal and according to the course of the Statute. But it will be found on examination, that these decisions were made on some peculiar provision in the local Act, under which the sale took place, or without reference to the principle to which we have already adverted, to wit : the distinction between sales made under summary proceedings, or the authority of Courts of limited jurisdiction, where the facts which give jurisdiction ought to appear, in order to show that its proceedings are *exram judice*, and sales under judgments of Courts of general jurisdiction. No presumption arises in favor of the exercise of power by a Court of special jurisdiction. The rule is universal that the record must show every thing necessary to give jurisdiction, much less does any presumption arise in favor of the legality of the acts of a Tax Collector or other officer, who executes summarily, limited power, expressly delegated. He must show, or the purchaser must, who claims through him, that the contingency has happened, the condition been performed, which are necessary to give validity to his acts. But not so with the Sheriff, who derives his power to sell from the process of a Court of general jurisdiction. In the former case, the acts of the agent are, *prima facie*, void. In the latter, they are, *prima facie*, valid—indeed, for certain purposes, conclusively so.

[8.] The last exception is, that Martin Brooks, the defendant in execution, died after the judgment and after the *fi. fa.* had issued, but before the levy, and that the heirs at law were *minors* at the time, and that there was no representative upon his estate.

It is conceded, that at *Common Law* the *fi. fa.* could proceed, notwithstanding the death of the defendant. But it is concluded, that by the Statutes of this State, a defendant, after execu-

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tion has issued, has the right by affidavit of illegality, to arrest the progress of the *fi. fa.* for any irregularity ; to point out what portion of his property shall be seized by the officer, in satisfaction of the debt ; to sue for and recover the difference between the price bid at the first and second sales, in case of non-compliance by the purchaser with the terms ; that he is entitled to notice of the levy, if it be on land, as in the present case ; and to appear in Court and superintend personally, the proper appropriation of the money arising from the sales. That inasmuch, therefore, as there is something which the defendant may do to protect his interest, that either the defendant himself, must be in life, or legally represented, provided he is dead, before the process can be enforced.

But is there nothing which may be done in *England*, after the execution has issued, to arrest its progress ? What was the object of the writ of *audita querela*, but to be relieved from a judgment or *execution*, for some injustice of the party who obtained it ? It is true, that the summary remedy by *motion*, has superseded mainly this ancient process. Still the change as to the mode of relief, does not weaken the force of the reply, that at Common Law, no less than by the Statutes of this State, the defendant in execution has the right to be relieved from the wrongful acts of the opposite party.

It is manifest, then, that it will not do to rest this proposition upon the ground occupied by counsel. To change the Common Law in this respect, we are clear, would require the interposition of the Legislature. It can only be done by Statute. The argument to be deduced from the Statutes already of force, and to the provisions of which I have adverted, constitutes, in our opinion, no such case of repeal by necessary implication, as would authorize this Court to make the change.

And while it is conceded that this is not precisely the question adjudicated in *Ingram vs. Hurt*, (10 Ga. R. 568,) yet this case is fully embraced in the reasoning of the Court in that case ; and it only remains to repeat here, the intimation thrown out there, that is, that the Court of Equity is always open for the

assistance and protection of *minor heirs* or adults, priority creditors, or any others who are likely to be injured by the enforcement of the execution, for the want of an administration.

Let the judgment be affirmed.

No. 59.—WILLIAM DOUGHERTY and others, plaintiffs in error,
vs. SEABORN JONES and others, defendants in error.

[1.] Where the Court below, in the exercise of its discretion, on the showing of the defendants, that some of them from sickness, had not been able to file their answers, refused at the second term of the Court, after the bill was filed, to allow the complainant to take his bill *pro confesso*: *Held*, that in such a case, this Court would not control the discretion of the Court below; especially as there had been no order entered on the minutes of the Court, requiring the defendants to answer the complainants' bill at the next term.

In Equity, in Muscogee Superior Court. Decision by Judge
IVERSON, at November Adjourned Term, 1851.

This bill was filed, returnable to May Term, 1851. At that term, the Court entered "Usual Rule" upon the Docket, but no order was entered on the minutes. At the next term, no demurrer, plea or answer having been filed, counsel for complainants moved to take the bill "*pro confesso*." This motion, defendant's counsel resisted, and showed as a reason why the answers were not filed, that one of the defendants, Ann E. McDougald, was so ill, as not to be able to complete her answer, which was almost ready to be filed; that the answer of S. Jones, was complete but had been mislaid by Col. Holt, who was absent by leave of the Court. The answers of Alexander McDougald, and Duncan McDougald were ready to be filed. The Court granted two days to defendants, at the end of which

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time the answers were all filed except that of Mrs. McDougald, who was still confined by sickness, and whose counsel was absent under leave of the Court. The Court granted further time to file her answer, and refused the motion to take the bill *pro confesso*.

To all of which rulings and decisions, counsel for complainants excepted, and have assigned error thereon.

WILLIAM DOUGHERTY, for plaintiffs in error.

BENNING, for defendants in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The alleged ground of error in this case is, the refusal of the Court below to allow the complainant to take an order at the second term of the Court, to have his bill taken *pro confesso*, under the circumstances stated in the record. The Court, in the exercise of its discretion, refused the application on the showing made by the defendants. We see no good reason why we should control the discretion of the Court in this case; especially, when it is apparent, that there was no order of the Court entered on the minutes, requiring the defendants to answer the complainant's bill at the next term of the Court. Let the judgment of the Court below be affirmed.

No. 60.—WILLIAM DOUGHERTY and others, plaintiffs in error,
vs. SEABORN JONES and others, defendants in error.

[1.] The manner of examining parties before a Master in this State, is by written interrogatories, settled by the Master.

In Equity, in Muscogee Superior Court. Decision by Judge
IVERSON, at Chambers, April, 1852.

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The question in this case arose upon an investigation before Judge *Iverson*, sitting as a Master in Chancery. In response to an order of the Court, Seaborn Jones and other parties defendants filed a written answer to the matters contained in the order served upon them. Their answers not being satisfactory to the complainants, counsel moved that the defendants be placed upon the stand, and be examined orally before the Master, which motion was refused, on the ground that by the usage of Chancery Courts, all such examinations must be in writing.

This decision is assigned as error.

WILLIAM DOUGHERTY, for plaintiff in error.

BENNING, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] This question, as to the manner of examining a party before the Master, is new in our Courts. In this case, the Judge of the Superior Court, who is the Chancellor, seems to have acted as a Master. Our Chancery organization, except in particular localities by special Act, recognizes no such distinctive officer as the Master. The Chancellor himself, as in this case, may assume the functions of the Master, for the purpose of interlocutory orders. When so acting, in the absence of any legislation to direct the mode of procedure, he will be governed, so far as our peculiar Chancery organization will permit, by the rules and usages of the English Courts. As to the manner of examining a party or a witness in the Master's office, our legislation is silent.

The provisions of our laws, as to the taking of testimony, relate to *trials* at Law and in Equity. This being the state of the case, the only thing to be settled here is, the manner of examination. In the Master's office in England, prior to the time when we adopted the British Common Law, that was in writing, upon interrogatories duly settled by the Master, *toties quoties*. *Daniel's Ch. Pr.* 1366. 2 *Johns. Ch. R.* 499. 11 *N. H. R.*

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501. *Dickens*, 548. 6 *Vesey*, 459. 17 *Ibid*, 434. 1 *Turner's Pr.* 103, 5, 10.

This was the mode of examining parties and witnesses. In the case of a party, the interrogatories were *settled* by the Master; in the case of a witness, they were settled by the counsel, unless in the order of reference, the Master was directed to settle them himself. By an order or rule, promulgated in 1828, the Master was at liberty to examine any creditor or other person, coming in to claim before him, either in writing or *viva voce*, or in both modes, as the nature of the case might seem to him to require; the evidence being taken down at the time, by the Master or the Master's clerk, in his presence, and preserved, in order that the same might be used if necessary. *Daniel's Ch. Pr.* 1379. In case of a mere witness, this is a safe and convenient practice. We think when parties are examined before the Master, the original rule, which is in fact obligatory upon this Court, is safest, and ought to be adhered to.

Let the judgment be affirmed.

No. 61.—EDWARD CAREY, assignee &c., plaintiff in error, vs.
PHILIP A. CLAYTON, defendant in error.

[1.] The Bank of Columbus, upon the application of P. A. Clayton, one of its customers, rendered him an account of his dealings with the institution, taken from its books, showing a balance of indebtedness to C. of \$1,159 15, which purported to have been carried to "*new account*." It did not appear from the proof that any other account had been raised between the parties: *Held*, that to a suit against C. at the instance of the Bank, the defendant was entitled, without further testimony, to the benefit of this acknowledgment, in support of his plea of set-off, to which the account rendered was attached.

Assumpsit, &c., in Muscogee Superior Court. Tried before Judge IVERSON, November Adjourned Term, 1851.

Edward Carey, as the assignee of the Bank of Columbus, brought suit against Philip A. Clayton, upon a promissory note for \$1,000, payable to A. B. Davis, and indorsed by him to the Bank.

Clayton pleaded payment, and also pleaded as a set-off an account current rendered by the Bank of Columbus to P. A. Clayton, which was balanced, the last item on the debit side of which was as follows :

“Balance account to new account, \$1,159 15.”

Defendant notified the plaintiff to produce all the books of the Bank containing any account between defendant and the Bank. In response to which notice, on the trial plaintiff showed that the books were not within his control ; having probably been destroyed by fire when the banking house was burned.

The Court charged the Jury, “that although there was nothing due the defendant on the account annexed to the plea of set-off, that account being on its face balanced, and the balance in favor of defendant carried to new account, yet it was an acknowledgment of the Bank of Columbus, that that balance constituted an item in the new account, and that it was incumbent on the Bank of Columbus to show that the said balance of account was paid or absorbed by items or charges against the defendant.”

To which charge plaintiff's counsel excepted and has assigned the same as error.

W. DOUGHERTY, for plaintiff in error.

BENNING, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of *assumpsit*, brought by Edward Carey, as the assignee of the Columbus Bank, against Philip A. Clayton, to recover a note of \$1000, given originally to A. B. Davis, and by him transferred to the Bank.

[1.] To the action the defendant pleaded payment and set-off ;

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and to the plea of set-off attached a copy of an account between the Bank and himself; and which had been furnished him by one of the officers from the books of the Bank. After stating all the items of debit and credit, the account was balanced, and there was \$1,159 15, due Clayton, which purported to have been carried to "new account."

The plaintiff was notified to produce all the books in his possession which contained any dealings between the parties; and to this requisition he responded that he had none. It was in proof, moreover, that all the books of the concern had been destroyed.

The Court charged the Jury that although there was nothing due the defendant on the bill of particulars annexed to his answer—the same being balanced and the residue carried to "new account"—yet it was an acknowledgment by the Bank of Columbus that that balance constituted an item in a new account, and that it was incumbent on the plaintiff to show that this balance had been paid or absorbed by items or charges against the defendant.

• The plaintiff excepts to this charge, both because it expresses to the Jury the opinion of the Court upon the testimony, contrary to the Act of 21st February, 1850, (*New Dig.* 462,) and because it is a misdirection in law, inasmuch as the "new account" containing this evidence of indebtedness is not pleaded as a set-off by the defendant.

If there be error in the instruction, and we are inclined to think there is, it is against the defendant. For while it is true that the whole account, as rendered from the books of the Bank, is evidence, was the Jury bound to give equal credit to all of it?—to the entry which discharged, as well as to those which charged the Bank? Suppose the Clerk who kept the books had stated at the foot of the account that the balance of \$1159 15, due Clayton, had been applied to the payment of his note due the Bank, or to the discharge of rent which he owed the corporation, or in payment of real estate sold to him by the Bank? In the absence of all corroborating proof, would the Jury be bound to acquit the Bank from liability, upon this testimony?

We have a right to assume that no new account ever was raised between these parties; there is no evidence that any such ever was. Mr. Davis or the Clerk may have intended it, but omitted or were prevented by death or other cause from doing it.

The action of *assumpsit* is an equitable suit. Pleadings are simplified, both as to defendants and plaintiffs. A copy of the plaintiff's indebtedness is attached to the plea; and from any thing that appears to the contrary, the entry of the balance of indebtedness, deduced too from the actual items in the account of dealings between the parties in the original account, is the only evidence of indebtedness from the Bank to Clayton. We are bound to presume from the circumstances which are disclosed, that such is the fact. If this original account shows then a balance due the defendant, is it not incumbent on the other party to introduce evidence to discharge himself?

Put the defendant upon proof of a new account, as the plaintiff insists shall be done, and he necessarily loses his debt, for he could not prove that any such ever existed. The books are destroyed and there is no witness to establish any such account; otherwise the testimony of that witness would have been adduced. The existence of such an account is an affirmative fact, supplied from the books of the Bank, and which the plaintiff was bound to have proven.

Is it not going too far to hold that the mere entry at the foot of an account that a balance of \$1159 15, due the defendant, has been carried to "new account," shall defeat his recovery, unless he can prove the truth of that entry?

The charge of the Court was no intimation of an opinion that this balance was due; he states merely the legal effect of its transfer to a new account, and how that result was to be overcome; namely, by showing that it was counterbalanced by charges against the defendant. The only expression of opinion was against Clayton, that the old account was balanced, and that there was nothing due upon it. This should have been left to the Jury.

No. 62.—JOHN G. WINTER, plaintiff in error, vs. THE MUSCOGEE RAILROAD COMPANY, defendants in error.

- [1.] Where the Judge of the Superior Courts of any one of the Circuits in this State, is a party to a suit, or interested therein, the Judge of any other Circuit has jurisdiction to preside at the trial of the same; notwithstanding the Justices of the Inferior Court *may* preside therein, as provided by the Statute.
- [2.] According to the provisions of the Acts of 1799 and 1810, providing for the trial of causes by a Special Jury, the parties are entitled to at least eighteen *impartial* Grand Jurors, from which to select a Special Jury, and when the list of Grand Jurors furnished by the Clerk, shall be reduced to a less number than eighteen, by *challenges for cause*, it is the duty of the Court to direct the Sheriff or his Deputy, to summon from the by-standers or others, such number of persons, who are qualified to serve as Grand Jurors, as will furnish the parties with a pannel of at least eighteen *impartial* Grand Jurors, from which to select a Special Jury.
- [3.] When by the By-Law of a Railroad Company, it was required that all the stockholders in the Company, who should fail or refuse to pay up the instalments then called in, or which might be called in by the 10th March then next, should be sued for the full amount of their subscriptions to the Company; and the defendant, who was sued as a stockholder, and who was President of the Company, and present at the time of the adoption of the By-law in question by the Company: *Held*, that a demand of payment of his stock subscription prior to the suit against him, was not necessary.
- [4.] Where by an Act of the Legislature, passed in 1845, a Railroad charter was granted to a Company, to build a road between certain points therein designated, and afterwards, in 1848, the defendant subscribed for one hundred shares of stock in the Company, and in 1850, the Legislature passed an Act amending the original charter, by which, the eastern terminus of the road was changed, running the road in a different direction from that contemplated by the original charter, and connecting it with another road: *Held*, that this was such a *material* and *essential* alteration of the original contract, as would release the defendant from his stock subscription, *unless his assent* to such alteration could be shown.
- [5.] Corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their *agreement* and *consent*.
- [6.] Although alterations may be made in the charter of an incorporated Company, by the procurement of the Company, in furtherance of the designs and objects of the Company; yet in all such cases, due regard must always be had to the *inviolability* of private contracts. The *original* contract of the parties cannot be *materially* or *essentially* altered by an *amended* charter, so as to bind the subscribers thereto, *without their assent*.

Winter vs. The Muscogee Railroad Company.

Assumpsit, &c., in Muscogee Superior Court. Tried before Judge POWERS, November Adjourned Term, 1851.

This was a suit by the Muscogee Railroad Company against John G. Winter, upon a subscription for \$10,000 of the Stock of the said Company. When the case was called for a hearing, counsel for Winter moved for a continuance, on the ground of the absence of one Dubois, by whom he expected to prove the location of the present Muscogee Railroad; a fact material to the defence. The Court refused the motion, holding that he would recognize the fact that the present Muscogee Railroad ran to Fort Valley as a part of the history of the times. This decision was excepted to by counsel for Winter.

Counsel for Winter then moved to continue the cause, on the ground that Abner Powers, Judge of the Macon Circuit, then presiding in Muscogee Superior Court, had no jurisdiction; the Hon. Alfred Iverson, the Judge of said Court being interested in the cause; in which event the Statute provided that the Justices of the Inferior Court should preside.

The Court overruled the motion and counsel for Winter excepted.

The cause being ordered to trial, a pannel of twenty Grand Jurors were reported in attendance. Ten of these were challenged for cause, on the ground that they were either individually stockholders, or were citizens of Columbus, which city was a stockholder to the amount of \$150,000. The Court ordered the pannel filled to twenty-three, from which he allowed the challenge to ten for cause. Counsel for Winter then moved the pannel should be filled with disinterested talesmen to at least eighteen. Which motion the Court refused; but ordered the Jury to be stricken from the thirteen Jurors remaining on the list. The plaintiffs being the appellant, struck one, and the remaining Jurors were impannelled to try the cause. To which decision counsel for Winter excepted.

It appeared from the minutes of the Board of Directors, that on the 12th of February, 1848, John G. Winter being present

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and the President of the Company, the following By-law was adopted, viz :

“ That the amount of stock of all those of the stockholders in the Muscogee Railroad Company, who fail or refuse to pay up the instalments already called in, or which may be called in by the 10th of March next, shall be held and deemed to be due for the full amount of their and each of their subscriptions for stock in said Company, and that the President do proceed to cause suits to be instituted against all such stockholders as shall fail or refuse as aforesaid, for the full subscriptions for stock in said Company.”

Counsel for Winter insisted that suit could not be sustained against him on his subscription, without proof of a demand for the instalments, and a refusal to pay. Which position the Court overruled, and counsel for Winter excepted.

The main question in the cause arose upon the plea of defendant, that the Company had materially changed the route of their road and thus released him from his contract of subscription. Upon this point, the facts appeared as follows :

The subscription was as follows : “ We, the undersigned, do hereby subscribe for the number of shares in the capital stock of the Muscogee Railroad Company, which are placed opposite our names ; and agree to pay to said Company the sum of One Hundred Dollars per share in such amounts and at such times as the same may be called for by the Board of Directors of said Company.” Winter subscribed for one hundred shares of the stock.

The Muscogee Railroad Company was incorporated by an Act of the Legislature, passed at its session in 1845, by which the Company were authorized to build a road from the City of Columbus to some point at or near the Macon and Western Railroad, between Macon and Atlanta, these being the two termini of the Macon and Western Railroad.

By an Act amendatory of the charter, passed by the General Assembly in February, 1850, the Muscogee Railroad Company were authorized “ to connect their Railroad with the South-

western Railroad at Fort Valley or at any point between Fort Valley and the City of Macon."

On the 10th of April, 1851, the following resolutions were passed by the Board of Directors of the Muscogee Railroad Company, John H. Howard being President, (Winter being no longer a member of the Board.)

"*Resolved*, That the Company, in consideration of the subscriptions which have been recently made to build the twenty-one miles of road from Fort Valley to the contemplated east terminus of the Muscogee Railroad, do hereby relinquish to the Southwestern Railroad Company, for the use of said subscribers, all the right that it possesses to occupy the ground selected for the said twenty-one miles of road, and agrees to terminate its road and franchises at the point, fifty miles eastward of Columbus, known as the Wolf-Pen.

"*Resolved*, That this Company hereby pledges itself to unite in an application to the Legislature to have the said twenty-one miles appended to the Southwestern Company, and detached from this Company."

Counsel for Winter requested the Court to charge the Jury—"That the charter of the Muscogee Railroad Company, as it existed at the time of defendant's subscription, is as much a part of the contract as though the same had been embodied in the caption to the subscription paper, and that no material alteration could be made in said contract by the Muscogee Railroad Company or by the defendant, without the consent of both parties. Therefore, if the Jury find that the road in the course of construction is a different road from that set forth in the original charter, then defendant is not bound for the instalments called in, unless the assent of defendant to such change of route has been proved; or if the Jury find that the terminus of the present road is at a point not contemplated by the original charter, although it may be embraced in the amended charter, yet the defendant is not bound, unless his assent to such amended charter is proven."

The Court refused so to charge, but instructed the Jury—"That the charter constituted a part of the contract of subscrip-

tion, and that an alteration in the route of the road, which would defeat the original object intended by the corporation, would release the defendant, if made without his consent; but if the original object was carried out by the change of route, under an amendment of the charter, obtained against the consent of the defendant, such change of route would not release the defendant; and if the Jury believed that the plaintiffs, by joining the Southwestern Railroad at Fort Valley or any other point, has succeeded in reaching a point at or near the Macon Railroad, this being a terminus in the original charter, it would not in the opinion of the Court, be such an alteration of the contract as would release the defendant. This is matter of fact which the Jury must determine upon; and if from the evidence they believe that the original objects and purposes of the defendant, in subscribing to the first charter and first route, was materially defeated by the amended charter and change of route, then he was not further bound by his subscription, and they should find for the defendant."

To which charge and refusal to charge, counsel for Winter excepted.

Defendant's counsel farther requested the Court to charge the Jury—"That the amendment of the charter could not affect the contract of subscription, because it would be repugnant to the Constitution of the State and of the United States, in this, that it would impair the obligation of the contract."

Which the Court declined giving in charge, saying it was already sufficiently covered by his charge. To this decision Winter excepted.

Upon these several exceptions error has been assigned.

MOSES, for plaintiff in error.

H. HOLT, for defendants in error.

By the Court.—WARNER, J. delivering the opinion.

The first ground of error assigned on the record in this case,

is the refusal of the Court below to continue the cause, on account of the absence of Dubois, a witness for the defendant, by whom he expected to prove the present location of the Muscogee Railroad; the Court holding, that it would recognize the existence of the fact which the defendant desired to prove by the witness, that the present route of the Railroad ran from Columbus to Fort Valley. According to the rule which this Court has heretofore adopted, we shall not control the *discretion* of the Court, in refusing to grant a continuance of the cause on the state of facts presented by this record; there is not such an *abuse* of the discretion confided to the Court below as will authorize this Court to control it.

[1.] The second ground of error taken in the record is, that Judge *Powers*, who is the Judge of the Macon Circuit, had no jurisdiction to preside at the trial of the cause; inasmuch as Judge *Iverson*, who is the Judge of the Chattahoochee Circuit, is interested in the cause; that the Act of 5th December, 1801, provides, "that in all cases brought in the Superior Courts or any of them, where either of the Judges thereof shall be a party, or interested therein, it shall be the duty of three or more of the Justices of the Inferior Court to preside at the trial of the same" *Prince*, 433. By the Act of 8th December, 1806, the Judges of the Superior Courts of this State are authorized to *alternate* in their respective districts, *any law to the contrary notwithstanding*. *Prince*, 434. Because the Justices of the Inferior Court *may* preside at the trial of a cause in which the Judge of the Superior Courts of the circuit for which he was elected, is a party or interested therein, it does not necessarily follow that a Judge of the Superior Courts of another circuit *may not*. The Judge of the Macon Circuit had the power and authority, under the Constitution and laws of this State, to preside at and hold a Court in any County of the Chattahoochee Circuit, in the absence of the Judge of the latter circuit, or when he is a party to, or interested in any cause pending therein. A Judge of the Superior Courts of any one circuit in this State, has the power and authority to hold a Court in any other circuit of the State, whenever circumstances make it necessary and proper that he should

do so. The jurisdiction is *general* throughout the State, and not limited to the particular circuit for which he may have been elected. The Act authorizing the Justices of the Inferior Court to preside in cases where the Judge of the Superior Court is a party or interested, was intended to prevent a *failure of justice*, whenever the Judge of the Superior Court should fail or refuse to call in the Judge of another circuit for the trial of such causes.

[2.] The third ground of error taken in the record is, that the Court refused the defendant a pannel of at least eighteen *impartial* Jurors, from which to select a Special Jury for the trial of his cause.

It appears there were but twenty Grand Jurors in attendance upon the Court; whereupon the Court ordered the pannel filled up to twenty-three; ten of the twenty-three were challenged for *cause* by the defendant, which was allowed by the Court, leaving only thirteen from which to select a Special Jury; the plaintiff being the appellant, struck off one of the thirteen, and the defendant was compelled to accept the remaining twelve to try his cause, without having had any strike at all. By the 41st section of the Judiciary Act of 1799, it is declared that "no Grand Jury shall consist of less than eighteen or more than twenty-three." *Prince*, 429. The Act of 1810 declares, that "All Special Jurors shall be taken from the Grand Jury list of the County, and struck in the presence of the Court, in the following manner: The Clerk shall produce a list of the Grand Jurors present, and there impannelled, from which the parties, plaintiff and defendant, or their attorney, may strike out one alternately, until there shall be but twelve Jurors left, who shall forthwith be impannelled and sworn as Special Jurors, to try the appeal cause; and in all cases, the appellant shall strike first." *Prince*, 435.

The *Grand Jurors* on the Clerk's list, from which the Special Jury are to be selected, by the Act of 1810, must be viewed in the light of the Common Law, which requires *impartial* Jurors; and when we construe that Act, in connexion with the Judiciary Act of 1799, providing for the qualification, summoning, and impannelling of Grand and Petit Jurors, the *intention* of the

Legislature is quite apparent, that the parties are entitled to at least eighteen *impartial* Grand Jurors, from which to select a *Special Jury* for the trial of an appeal cause. The 44th section of the Judiciary Act of 1799, after specifying in what manner Grand and Petit Jurors shall be fined for non-attendance, &c., goes on to declare that, "When from *challenge*, or otherwise, there shall not be a sufficient number of Jurors to determine *any civil* or criminal cause, the Court may order the Sheriff or his Deputy, to summon by-standers or others, qualified as heretofore required, for the trial of such cause or causes, sufficient to complete the pannel, &c." *Prince*, 430. The list of the Grand Jury furnished by the Clerk having been reduced to thirteen by *challenge for cause*, it was the duty of the Court to have directed the Sheriff or his Deputy to have summoned from the by-standers or others, such number of persons, who were *qualified to serve as Grand Jurors*, as would furnish the parties with a pannel of at least eighteen *impartial* Jurors, from which to select a *Special Jury* for the trial of that particular cause; and in our judgment it was error in the Court, in refusing to do so.

[3.] The next ground of error is, that the Court erred in deciding that suit could be maintained against the defendant, without evidence of a *demand* of payment of the instalments due upon his subscription, &c. It is apparent on the face of the record, that the defendant was President of the Muscogee Railroad Company, and was present on the 12th February, 1848, at a meeting of the Board, when a By-law was adopted requiring suit to be instituted against *all* the stockholders in the Company, who should fail or refuse to pay up the instalments then called in, or which might be called in by the 10th March then next, for the full amount of their subscriptions for stock in the Company. The defendant *knew* that he had failed and refused to pay the instalments called in, and that his *whole subscription* was due, and would be sued for, according to the terms of the By-law of the Company, of which he had ample notice; therefore, no *demand* was necessary, according to the facts contained in this record.

[4.] The great question made in this case is, whether the

defendant was released from the payment of his stock subscription to the Company, in consequence of a change of the route of the road, without his *assent*. In December, 1845, an Act was passed by the General Assembly of this State, incorporating the Muscogee Railroad Company, and authorizing said Company to construct a Railroad from the City of Columbus to some point "at or near the Monroe Railroad *from Macon* to the *terminus* of the Western and Atlantic Railroad in DeKalb County, to be selected and determined upon by the Directors hereinafter authorized to be elected, &c." (*See pamphlet Acts, 1845, 116.*) The defendant in the Court below and plaintiff in error here, on the 1st day of Jan. 1848, became a subscriber for one hundred shares of the stock in said Company, and refusing to pay the same, suit was instituted against him for the recovery thereof. The main ground of defence insisted on by the defendant against the payment of his stock subscription is, that the route of the road was altered and changed by an Act of the Legislature, passed in February, 1850, *without his assent*.

By the original Act of Incorporation, the road was to be constructed from the City of Columbus, to some point at or near the Monroe Railroad, *from Macon* to the terminus of the Western and Atlantic Railroad in DeKalb County. The eastern terminus of the road was to be at or near the Monroe Railroad, at any point which the Directors might select *between* the City of Macon and the terminus of the Western and Atlantic Railroad in DeKalb County; that is to say, the eastern terminus of the Muscogee Railroad was not to be further north than the *terminus* of the Western and Atlantic Railroad in DeKalb County; nor further south than the *terminus* of the Monroe Railroad at Macon; but was to terminate at some point at or near the Monroe Railroad *from Macon* to the *terminus* of the Western and Atlantic Railroad in DeKalb County. By the Act of 1850, the Muscogee Railroad Company were authorized and empowered to connect their road with the Southwestern Railroad at Fort Valley, or at any point between Fort Valley and the City of Macon. (*See pamphlet Acts, 1850, 245.*) In pursuance of this latter Act, the Board of Directors of the Muscogee

gee Railroad Company, on the 10th April, 1851, adopted and passed the following resolutions :

"Resolved, That the Company, in consideration of the subscriptions which have been recently made to build the twenty-one miles of road from Fort Valley to the contemplated east terminus of the Muscogee Railroad, do hereby relinquish to the Southwestern Railroad Company, for the use of said subscribers, all the right that it possesses to occupy the ground selected for the twenty-one miles of road, and agrees to terminate its road and franchises at the point, fifty miles east of Columbus, known as the Wolf-Pen."

"Resolved, That this Company hereby pledges itself to unite in an application to the Legislature, to have the said twenty-one miles appended to the Southwestern Company, and detached from this Company."

When these two resolutions were passed, the defendant was not a member of the Board, and so far from *his assent* to the change of the route of the road appearing on the face of the record, there is evidence of *his dissent* ; the record evidently shows, that the defendant was in favor of the Barnesville route, and opposed to the present route of the road.

Wm. L. Jeter, a witness introduced by the plaintiff, to prove the declarations of the defendant in regard to his stock subscription, states that he "heard the defendant say about a year ago, that he was sued for \$10,000 stock in the Muscogee Railroad Company ; manifested much feeling, and said he did not think he ought to pay it, as the road being built, was *essentially different* from the *original road*." Calvin P. Stratton, a witness introduced by the plaintiff, testified among other things, "that in 1847, at a meeting of the citizens of Columbus in said city, he heard the defendant, as a stockholder in the Muscogee Railroad Company, urge the locating of the road to Barnesville ; that at the same meeting, Major John H. Howard urged the Upatoie, or southern route ; that the meeting determined on the Barnesville route, and Major Howard said, if it went to Barnesville, he would be damn'd if he would pay his subscription, and defendant said, he would make him ; that at the same meeting,

in urging the Barnesville route, the defendant said, I am in for \$10,000, and if the road goes to Barnesville, I will subscribe for \$40,000 more, but if it goes the *other route*, I will have nothing more to do with it."

The Company have adopted the Upatoie, or southern route, for the location of their road, and the same is now being completed over that route. The Act of 1850 authorized the Company to connect their road with the Southwestern road, at Fort Valley, a point some twenty-five or thirty miles southwest from Macon, and the Company have by resolution, abandoned twenty-one miles of their road west of Fort Valley, and have agreed to terminate it at a point fifty miles east of Columbus, known as the Wolf-Pen. The present Muscogee Railroad is only to be extended fifty miles east of Columbus, in the direction of Fort Valley, and its eastern terminus is to be the Southwestern Railroad, at the Wolf-Pen.

The *fact*, that the present route of the Muscogee Railroad, runs from Columbus to Fort Valley, was conceded by the Court at the trial; that is to say, the *eastern terminus* of the Muscogee Railroad, by the amended charter, was at Fort Valley, and the road was being built in *that direction*. The Act of the last Legislature authorizing the connexion of the Muscogee Railroad with the Southwestern Railroad at the Wolf-Pen, (not having been yet published,) is not before us, but it was assumed on the argument to have been done, in pursuance of the resolution of the Company, passed on the 10th April, 1851, as heretofore recited. After the evidence had closed, the defendant by his counsel, requested the Court to charge the Jury—"That the charter of the Muscogee Railroad Company, as it existed at the time of the defendant's subscription, is as much a part of the contract, as though the same had been embodied in the caption to the subscription paper, and that no *material* alteration could be made in said contract by the Muscogee Railroad Company, or by the defendant, without the consent of both parties.

Therefore, if the Jury find that the road now in the course of construction is a different road from that set forth in the original charter, the defendant is not bound for the instalments called in,

unless *the assent* to such change of route by the defendant, has been proved; or if the Jury find that the *terminus of the present road* is at a point not contemplated by the original charter, although it may be embraced in the *amended* charter; yet, the defendant is not bound, unless *his assent* to such amended charter is proved."

The Court refused to charge the Jury as requested, but on the contrary charged them—"That the charter constituted a part of the contract of subscription, and that an alteration in the route of the road, which would defeat the original object intended by the corporation, would release the defendant, if made without his consent; but if the original object was carried out by the change of route under an amendment of the charter, obtained against the consent of the defendant, such change of route would not release the defendant; and if the Jury believed that the plaintiff, by *joining the Southwestern road at Fort Valley, or any other point, has succeeded in reaching a point at or near the Monroe Railroad, this being a terminus in the original charter, it would not in the opinion of the Court, be such an alteration of the contract as would release the defendant.* This is a matter of fact, which the Jury must determine upon, and if from the evidence, they believe that the original objects and purposes of the defendant, in subscribing to the first charter and first route, was materially defeated by the amended charter and change of route, then he was not further bound for his subscription, and they should find for the defendant." Whereupon the defendant, by his counsel, excepted to the refusal of the Court to charge the Jury as requested, and to the charge as given.

[5.] Was the alteration of the eastern terminus of the Muscogee Railroad at or near the Monroe Railroad, from Macon to the terminus of the Western and Atlantic Railroad in DeKalb County, to the Southwestern Railroad at Fort Valley, or the Wolf-Pen, without *his assent*, such a *material* alteration of the defendant's contract, under the original charter, as will release him from the payment of his stock subscription thereto?

The road, by the alteration, is shortened in distance, runs through different neighborhoods, and is necessarily made de-

pendent on another Company, to reach near the point contemplated by the original charter.

The original charter contemplated a road to be built by the Company, from Columbus to some point at, or near the Monroe Railroad, between Macon and the terminus of the Western and Atlantic Road, *wholly independent of the Southwestern or any other Railroad*; and in our judgment, the necessary change of the route, to reach the present eastern terminus of the Muscogee Railroad, as provided for by the amended charter, is an *essential alteration* of the defendant's contract, and releases him from its performance, unless *his assent* to such alteration be shown. In the case of *The Middlesex Turnpike Corporation vs. Locke*, (8th Mass. Rep. 268,) a Turnpike Road Company had been incorporated in 1805, and the defendant subscribed for stock therein in July of the same year, and afterwards, in the year 1806, the corporation procured an Act of the Legislature to be passed, altering the course of the turnpike road, from "Bisket Bridge in Tyngsborough, to the fork in Bedford;" and the road was altered in pursuance of the last mentioned Statute. The Act of 1806 was passed on the application of the directors of the corporation, and with the assent of said corporation, at a meeting thereof, duly holden. The point made by the counsel for the defendant in that case was, that he never *consented* to become a stockholder in the turnpike company, as it was *in fact located and made*; that the corporation had *no right* to transfer his subscription for the promotion of one road to that of another, without *his personal assent*; and so the Court decided. The Court say—"The plaintiffs rely on an *express contract*, and they are bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain *specified direction*, and of the making a turnpike in a *different direction*. The defendant may truly say, *non haec in federa veni*. He was not bound by the application of the directors to the Legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." This case is cited with approbation in *The Hartford & New Haven Railroad Company vs. Croswell*, 5th Hill's N. York Rep. 386. In this latter case, the

principle is asserted and maintained, that corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. See also *The Middlesex Turnpike Corporation vs. Swan*, 10 Mass. Rep. 385.

In the case now under consideration, the facts are undisputed, that by the amended charter, and the action of the Company in pursuance thereof, the present eastern terminus of the Muscogee Railroad is at the Wolf-Pen, fifty miles from Columbus; and that the eastern terminus of the road, as contemplated by the original charter, (to wit,) at or near the Monroe Railroad, from Macon, &c., cannot be reached, except by running several miles over the Southwestern road. Upon this state of facts, the Court below charged the Jury as a matter of law, "that if they believed that the plaintiff, by joining the Southwestern road at Fort Valley, or any other point, has succeeded in reaching a point, at or near the Monroe Railroad, this being the terminus in the original charter, it would not, in the opinion of the Court, be such an alteration of the contract as would release the defendant." It is true, the Court subsequently stated to the Jury, that this was a question of fact for their consideration; but if the Court intended to say, "that if the plaintiff, by joining the Southwestern road at Fort Valley, or at the Wolf-Pen, has succeeded in reaching a point at, or near the Monroe Railroad, as contemplated by the original charter, it would not be such an alteration of the contract as would release the defendant," was a fact for their consideration, we entirely dissent from that view of it. The fact, as disclosed by the record is, that the Muscogee Railroad Company, under the provisions of the amended charter, have connected their road with the Southwestern road at the Wolf-Pen, fifty miles east of Columbus, and cannot reach the Monroe Railroad from Macon, except by running some forty or fifty miles over the Southwestern road.

Whether this alteration of the terminus of the road, as contemplated by the original charter, and its connexion with the Southwestern road, without the assent of the defendant, was such an alteration of the contract as would release the defendant from

his stock subscription, was a *question of law*, arising from the facts proved, and the Court decided the law against the defendant, which, in our judgment, was error. With equal propriety might it be said, that the defendant would be bound to pay his subscription to the original charter, if by the *amended* charter, the Company had been authorized to connect their road with the Montgomery and West Point road, and by that means have reached the Monroe Railroad by running over the West Point and LaGrange Railroads, *from Columbus*.

By that arrangement, the plaintiff, by joining the Montgomery and West Point road at Opelika, or any other point thereon, might "have succeeded in reaching a point at, or near the Monroe Railroad, this being a terminus in the original charter;" but who will say that the defendant contemplated the building any such road, when he subscribed for stock under the original charter?

By the amended charter, authorizing the Muscogee Railroad to connect with the Southwestern road, the length of the road is shortened, thereby lessening the rates of freight, which may have been an important element of the defendant's contract under the original charter; besides, the Company cannot now *control the rates of freight between the points specified in the original charter*, but are dependent on the will and action of *another Company*.

The original charter contemplated an independent road from Columbus to some point at, or near the Monroe Railroad, between the points designated therein, to be controlled and managed by the Company itself, independent of any other Company; and under such a charter, the defendant subscribed for stock to build the road; but he never subscribed for stock to build a road from Columbus, to connect with the Southwestern Railroad at the Wolf-Pen, fifty miles from Columbus. When called on to pay his subscription for the building of such a road, without *his assent*, he may also truly say, "*non haec in federa veni.*"

[6.] We do not pretend to deny, that alterations may be made in the charter of an incorporated Company, by the procurement of the Company, in furtherance of the design and objects of the

Company; but in all such cases, due regard must always be had to the *inviolability* of private contracts. The *original contract* of the parties cannot be *materially* or *essentially altered* by an amended charter, so as to bind the subscribers thereto, without their *assent*. In view of the facts of this case, we are of the opinion that the Court below erred in charging the Jury as stated in the record, and in not charging them as requested by the counsel for the defendant. The charge, as requested, presented the law of the case in an unexceptionable point of view, and ought to have been so given to the Jury by the Court. The second request to charge the Jury, made by the counsel for defendant, as stated in the record, is substantially included in the first; therefore, we express no opinion in regard to that.

Let the judgment of the Court below be reversed.

No. 63.—THE CENTRAL BANK OF GEORGIA, plaintiff in error,
vs. BLANCHE G. GIBSON, defendant in error.

- [1.] A judgment rendered by a Court not having jurisdiction of the person or subject matter, is void, and may be impeached whenever and wherever it is sought to be used as a valid judgment.
- [2.] The clause in the State Constitution which requires all civil cases to be tried in the County wherein the defendant resides, *Held*, to apply to corporations as well as to natural persons.
- [3.] The Central Bank of Georgia, held to be suable alone at Milledgeville, and that a judgment rendered against it in the County of Muscogee, by consent of the Director, as to the jurisdiction, is void, both as to third persons and *inter partes*.
- [4.] Consent cannot confer jurisdiction on a Court which it does not possess by law, and a judgment rendered against an individual by a Court without jurisdiction, when the want of jurisdiction has been waived by the defendant, is void as to third person. Whether void as between the parties thereto—*Quere?*
- [5.] When the Court has jurisdiction of the person and subject matter, and the defendant has some privilege which exempts him from the jurisdiction,

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he may waive the privilege, and in so doing will be bound by the judgment.

Motion to set aside a judgment. In Muscogee Superior Court. Decision by Judge IVERSON, May Term, 1852.

This was a motion to set aside a judgment in favor of Blanche G. Gibson, against the Central Bank, recovered in the Superior Court of Muscogee County, on the ground that the Court had no jurisdiction; the bank being located by its charter, in Baldwin County.

To this motion, Blanche G. Gibson replied, that H. W. Jernigan & Co. had a claim upon the Government of the United States, of which she was half owner; that Jernigan transferred his interest therein to the Central Bank of Georgia; that when the claim was before the Congress of the United States, a conflict of interest being about to arise between herself and the bank, which would defeat the allowance of the claim, Alfred Iverson, Esq. as attorney for Mrs. Gibson, and David C. Campbell, Esq. as the Director of the Central Bank, agreed, that upon withdrawing all objections to the allowance of the claim to the bank, the claim of Mrs. Gibson to one-half the amount should be referred to arbitrators to be selected by the parties; that after the money was recovered by the bank, the Director (Campbell) proposed, instead of an arbitration, a suit, which was agreed to, on condition that, by consent, the suit should be brought in Muscogee County, for the convenience of the attorneys—Joseph Sturgis, for the Bank, Alfred Iverson, for Mrs. Gibson; that suit was brought, jurisdiction waived by the Director, the cause tried before Judge Powers, and judgment obtained. Before the trial, however, counsel for Mrs. G. was notified by the Governor, that he would not recognize the validity of the suit; that there was no fraud or collusion, and that the rights of third persons are not affected by the judgment.

The Court refused the motion to set aside the judgment, and this decision is assigned as error.

A. H. KENAN, for plaintiff in error.

BENNING, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] A judgment rendered by a Court not having jurisdiction of the person and subject matter, is a nullity, and may be impeached whenever and wherever it is sought to be used as a valid judgment. *Towns, Governor, vs. Springer et al.* 9 Geo. R. 130. 4 Geo. 47.

[2.] This judgment was rendered against the *Central Bank* by the *Superior Court of Muscogee County*, and the question is this, to wit: had that Court jurisdiction over the *Central Bank* in that County? By the Constitution of the State, *all civil cases* shall be tried in the County wherein the defendant resides. *Prince*, 910. Except in the cases provided for in the Constitution and in Equity cases, a citizen cannot be called to answer to a suit in any County of the State other than that of his residence. Anywhere else, jurisdiction over his person is denied to the Courts by the Constitution. Does this constitutional provision apply to *The Central Bank of Georgia*? It is claimed to apply only to natural persons. The reading of the Constitution is wholly free from ambiguity. It has no reference to the character of the person, but refers to *cases*. The declaration of the fundamental law is, that *all civil cases* shall be tried in the County where the defendant resides. This was a *civil case*. But it was farther argued that the defendant in this case, to wit: the *Central Bank* has no residence in any particular County; that its residence is in each and every County within the limits of the State, and if so, was as liable to suit in the *County of Muscogee* as any where else. If this be true, the Constitution was not violated, and the judgment is valid.

[3.] However plausible the idea may be, that a corporation, an intangible entity, deriving its existence and all its functions from the Legislature, and possessing no natural personality, is ubiquitous within the limits of the State, in the absence of any

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designation of its locality by law ; yet in this case it has no application, because the *charter* of the *Central Bank* fixes its locality at *Milledgeville*. *There*, therefore, it is suable—*there*, it is made by law, commorant. It is an artificial person, *resident*, by legislative enactment, at *Milledgeville*. The charter provides, “that a bank shall be established in behalf of the State of Georgia at *Milledgeville*, in said State, to be known and called by the name and style of the Central Bank of Georgia.” *Prince*, 72. This seems to be conclusive of this question. If, however, the charter did not determine the locality of the bank, I should hold that it would be considered as resident, for the purposes of a suit, in that County, wherein its place of business was situated. If the Constitution had directed that all civil cases should be tried in the County where the *citizen* resides, the argument of counsel would be more pertinent. It speaks of the *defendant*. A corporation is as truly a defendant as a natural person. Being a *defendant* in a *civil suit*, and made resident in a particular County, by a provision of its charter, we have no doubt but that it is within the protection of the constitution, and that suit can be brought against it alone in that County.

It is claimed farther that the *charter* subjects the bank to suit before any Court of Record, or in any other place whatsoever ; and the effect of this is to give it a residence in any County of the State for the purposes of a suit. The 15th section of the charter declares that the *Central Bank of Georgia*, by that name, “shall be and is hereby made able and capable in law, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in Courts of Record, or any other place whatsoever.” *Prince*, 74. This clause is not understood to enlarge the jurisdiction of any particular Court or Courts, but to give a capacity to the corporation to appear, as a corporation, in any Court which would, by law, have cognizance of the cause, if an individual were the party. Such was the construction which the *Supreme Court of the United States* put upon precisely the same clause in the charter of the *Bank of the United States*. *Bank of the United States vs. Devearuz et al.* (5 *Cranch's Rep.* 61.) The *Superior Court of Muscogee County*

would have, by law, no jurisdiction in a civil case, over an individual residing in the County of *Baldwin*; none, therefore, over this corporation, (upon this construction, clearly the true one of this clause in the charter) located in *Baldwin County*.

To save this judgment, the learned counsel has invoked a construction of the Constitution, which has the charm of novelty, and which it is our duty to notice! It is this: the limitation of the trial of civil cases to the County where the defendant resides, is referable to such civil cases as are brought in the Inferior Court, and has no reference to cases brought in the *Superior Court*. The Constitution gives to the *Superior Courts* concurrent jurisdiction in all civil cases, and after defining some other powers of the *Superior Courts*, it proceeds to declare that, "The *Inferior Courts* shall also have concurrent jurisdiction in all civil cases (except in cases respecting the titles to land) which shall be tried in the County wherein the defendant resides, &c. The reading of the counsel gives this meaning to this clause, to wit: *the Inferior Courts shall also have concurrent jurisdiction in all civil cases, which cases, when brought in the Inferior Court, shall be tried in the County wherein the defendant resides*; thus applying the requisition of trial in the County of the defendant's residence, to cases brought in the Inferior Court. Such is not the meaning of the Constitution. The clause referred to contains two propositions: the first, is a grant of concurrent jurisdiction with the *Superior Courts*, to the *Inferior Courts* in all civil cases; the second is a distinct statement, that all civil cases shall be tried in the County wherein the defendant resides. Whether in the *Superior* or *Inferior Courts*, *civil cases* are to be tried in the County of the defendant's residence. This has been the construction from the beginning. It is sustained by a fair reading of the clause, and yet more strongly vindicated by the reason and policy of the Constitution. There is no reason why a civil suit, when brought in the *Inferior Courts*, should be tried in the County wherein the defendant resides, which does not obtain, when such suit is brought in the *Superior Courts*. In either case, the reason and policy of the requirement are the same.

[4.] In this case the *Director* of the *Central Bank* waived the want of jurisdiction in *Muscogee*, and appeared and pleaded to the action upon the merits, making no objection to the jurisdiction. The case is not thereby altered. The waiver and pleading to the merits cannot give jurisdiction, when it is not given by law. ✓ Much less can they confer jurisdiction in a case where it is prohibited by law—by the fundamental law. The right of being sued in the County of his residence, is a privilege guaranteed by the Constitution to the defendant. But this is not all; it is founded in a policy which has reference to the rights of every citizen. Every citizen is interested to know what suits have been instituted against others—what liens have been created by judgments. It is his right to know these things by an inspection of the record. To protect this right there ought to be a fixed locality for the record. He ought not to be driven to search the records of every County in the State. With good reason, therefore, aside from the convenience of the defendant, the law requires civil suits to be tried where he resides.

To permit waivers expressly made, or implied from appearance, to confer jurisdiction, would be to defeat the policy of the Constitution.

[5.] There are cases where the Court has jurisdiction of the person and the subject matter by law, and the defendant has some privilege which exempts him from the jurisdiction, in which he may waive his privilege. So a citizen of a foreign State, may come into a Court of Georgia entertaining jurisdiction rightfully by our own laws, and waive his exemption from the jurisdiction, as a citizen of another sovereignty, and so doing will be bound by the judgment. Such cases depend upon principles very different from those which control the case before me. In the case of *The Georgia Railroad and Banking Co. vs. Harris et al.* we held, that a judgment obtained by consent in a County other than that of the defendant's residence, would be set aside in favor of a junior judgment creditor. We left the question open then, whether such a judgment would be valid as between the parties to it, when not in conflict with the rights of third persons. It will be seen by a perusal of that case, that the reasoning of this Court

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goes very far to set aside such a judgment, as between the parties. 5 *Ga. R.* 527. 4 *Ibid*, 50. 9 *Ibid*, 132. *R. M. Charl. R.* 300. The policy of the Constitution would seem to me necessarily to invalidate it. Third persons are not objecting to this judgment. It is a question between the plaintiff and the bank. This bank is a public corporation—its funds belong to the State—all the people are interested in them. The Legislature has made it suable at *Milledgeville*. Reasons of public policy require that it be sued there alone, which reasons do not apply with the same force to individuals. I shall not stop to state them.

Whether a judgment obtained by consent out of the County of the defendant's residence, in case of citizens, be or not valid, as between the parties, is a question which this Court reserves for future decision. This judgment we pronounce void, both as to third persons and *inter partes*.

Let the judgment below be reversed.

No. 64.—DOZIER THORNTON, plaintiff in error, vs. RICHARD A. LANE, defendant in error.

- [1.] Parties are not entitled, as *of right*, to re-argue upon another writ of error, points which have been already solemnly adjudicated.
- [2.] At Common Law, upon the dissolution of a corporation, the debts due to, and from it, are extinguished.
- [3.] The 11th section of the charter of the Planters' & Mechanics' Bank of Columbus, provides that, "the persons and property of the stockholders, shall be pledged and held bound in proportion to the amount of shares and the value thereof that each individual or company may hold in said bank, for the *ultimate redemption* of the bills or notes issued by said bank, in the same manner as in common actions of debt; and no stockholder shall be relieved from such liability by sale of his stock, until he shall have caused to be given sixty days' notice of said sale, in some public gazette of this State. *Held*, 1st. That the liability of the stockholder to the bill-holder for the

ultimate redemption of the notes of the corporation, survives the dissolution of the charter, and is not extinguished by the judicial forfeiture of the same.

2dly. That this is a statutory liability, *in the nature of a specialty*, and is not barred until twenty years.

3dly. That the value of the stock is to be estimated according to the valuation put upon it by the second section of the charter, to wit: one hundred dollars per share.

4thly. All the stockholders who have given notice, in terms of the Act, are exempt, unless the failure occurs within six months thereafter. All other stockholders are liable for the redemption of the bills, whether they have transferred or not.

5thly. That a judgment, *fi. fa.* and return of *nulla bona*, in a suit against the corporation, or its assignee, is sufficient to authorize the bill-holder to proceed against the stockholder personally.

[4.] What is *authority* in this State, and what *opinion* merely.

[5.] Where the declaration is upon a domestic judgment, rendered in a Court of Record, the plea of *nul tiel record* should conclude with a verification to the Court only:—*aliter*, where the writ is upon a foreign judgment, or a judgment rendered by a Court which is not a Court of Record.

[6.] The plea of *nul tiel record*, can only be pleaded to a record which is the gist or foundation of the action, and not to a record which is stated as inducement only.

[7.] A Judge may *confess* a judgment against himself, in a suit in his own Court, to which he is a party.

[8.] A party is not *estopped* from denying any *fact* which is recited in a legislative Act; but although such recitals are not *conclusive*, they should be treated as true until the contrary appear.

[9.] A party who is sued and confessed judgment against himself in a particular character, is foreclosed from afterwards denying that character.

[10.] Where the legal effect of the judgment and execution is the same, any verbal variance is immaterial.

[11.] The indorsement on the execution by the Sheriff, of "no property found in my County on which to levy," is not *prima facie* evidence even that the *fi. fa.* was returned on the same day.

[12.] The time of the return of the execution, is a *fact in pais*, and may be proven by *parol*.

[13.] The Sheriff may enter *nulla bona* on the *fi. fa.* and put it in his pocket and keep it till the return term, to which it is made returnable.

[14.] If a Sheriff or Constable, having in his hands a *fi. fa.* has made one full examination for goods without effect, he may return the execution *nulla bona*.

[15.] In a suit against one of several debtors, the plaintiff may call either of the others as a witness for him.

- [16.] In an action by the bill-holder against the stockholder, a transfer of stock made on the books of the bank, by the cashier of the corporation, of which the defendant was a member at the time, and free access being secured to him by law for the purpose of inspecting said books, is *prima facie* evidence of his ownership of the shares.
- [17.] Will the defendant be permitted to repudiate the transfer, without verifying his plea? *Quere.*
- [18.] The fact that a man is *insolvent* when he transfers his effects, does not make the conveyance void; and the same rule applies to corporations or artificial persons, as to natural.
- [19.] It is not only the privilege, but the duty of the Court to state the legal effect of testimony when called on to do so by the Jury. The construction of the law arising from undisputed facts, is undoubtedly within the jurisdiction of the Court.
- [20.] It is not error in the presiding Judge to say to the Jury, that the privilege and responsibility of rectifying errors of law, which may be committed by the Court, did not rest with them, but that the Constitution of the State had conferred this power elsewhere.
- [21.] It is no error in the Judge to instruct the Jury, that they were bound to regard the law, as stated by him, to be the law of the case. This Court has been vigilant from its first organization, in protecting the just rights and privileges of the Jury, from any encroachment from the Bench.
- [22.] Where verdicts were manifestly against evidence, they have not been permitted to be disturbed, unless they evinced by their gross injustice, passion, partiality or prejudice.
- [23.] This Court will be equally vigilant in upholding the powers of the Court. The right of the Court to decide upon the law, shall never be impaired or questioned. And if the Jury decide the law differently from the Court, a new trial will be awarded, *toties quoties.*
- [24.] The oath administered to a Special Jury on appeals in Common Law cases, is that which was originally prescribed for the Jury in *Equity* causes.
- [25.] The word *equity* in the oath administered to the Special Jury, is synonymous with *law*, and does not mean some undefined and undefinable notion which the Jury may entertain of the justice of the case, but a system of jurisprudence, governed by established rules, and bound down by fixed precedents. The Special Jury is sworn to try the cause according to equity and the *opinion* they entertain of the evidence, and not *their opinion* of *equity*, as well as the *evidence*.

Debt, &c. in Muscogee Superior Court. Tried before Judge IVERSON, at November Adjourned Term, 1851.

This was an action brought by Richard A. Lane, against Do-

zier Thornton, as one of the stockholders of the Planters' & Mechanics' Bank of Columbus, to enforce his ultimate liability to redeem the bills issued by the said bank.

To this declaration, defendant below filed the following pleas :

1st. And now at this Term comes the defendant, by Hines Holt, his attorney, and defends the wrong and injury, when, &c. and for plea and answer saith, that he does not owe in manner and form as the said plaintiff in his said declaration hath declared against him, and of this he puts himself upon the country, &c.

2nd. And for further plea in this behalf this defendant saith, *actio non*.

Because, he says, that if he ever did owe in manner and form as the said plaintiff has declared against him, the said several causes of action in said declaration mentioned, did not, nor did any of them happen or accrue to the said plaintiff, at any time within six years next before the commencement of the said actions, and this he is ready to verify. And whereof he prays judgment of the Court, and puts himself upon the country, &c.

3d. And for further plea in this behalf, this defendant saith, *actio non*.

Because, he saith, that if he ever did owe as said plaintiff hath declared against him, the right of action therefor accrued and happened to said plaintiff upon the failure of the said Planters' & Mechanics' Bank of Columbus, and upon the forfeiture of the charter thereof, and that more than six years elapsed between the happening of said events and the commencement of said action. Wherefore, he saith that the same is barred by lapse of time, and therefore he prays judgment of the Court and puts himself upon the country, &c.

4th. And for further plea in this behalf this defendant saith, *actio non*.

Because, he saith, that if he ever was a stockholder, and as such ever held and owned in his own right or otherwise, any stock in the said Planters' & Mechanics' Bank of Columbus, as in plaintiff's said declaration alleged, all his rights, interests and liabilities as such stockholder, ceased, determined, and became

extinct, upon the rendition of the following judgment of forfeiture, against the said Planters' and Mechanics' Bank of Columbus—bearing date on the 13th day of June, 1843; and found upon writ of *quo warranto*, sued out against said bank in the Superior Court of said County of Muscogee, all which will more fully appear by the evidence of the same, herewith submitted, to wit:

“It is considered by the Court here, that the liberties, privileges and franchises, to wit: that of being a body politic and corporate by the name and style of the Planters' and Mechanics' Bank of Columbus, heretofore used, enjoyed and exercised by the defendant, be seized into the hands of the State, and that the said defendant do not in any manner hereafter intermeddle, use, have, enjoy or exercise any of the liberties, franchises or privileges, of a body politic or corporate, but that the said defendant be absolutely forejudged and excluded from holding, using or exercising any of the privileges, franchises or liberties of a body politic or corporate, and that the State recover its costs to be taxed.”

And this defendant saith, that with and by virtue and force of said judgment of forfeiture, rendered as aforesaid, and which is still subsisting and unreversed, and of full force and effect, all debts due to and from the said Planters' and Mechanics' Bank of Columbus were extinguished.

Wherefore, this defendant pleads the same in bar of his liability on said stock, in any manner or form, and in bar of the said plaintiff's right of recovery, and thereof prays judgment of the Court, and puts himself upon the country, &c.

5th. And for further plea in this behalf this defendant saith, *actio non*.

Because, he saith, that if he ever was a stockholder in said Planters' and Mechanics' Bank of Columbus, as in said plaintiff's suit alleged, all his rights, duties and liabilities as such stockholder, except so far as the same are reserved and continued by public Acts of the Legislature of the State of Georgia, ceased, determined and became extinct upon the rendition of the judgment of forfeiture, as in the 4th above plea mentioned.

And because he saith, that by the same judgment of forfeiture, except so far as the same is reserved and continued by the aforesaid Acts of the Legislature, the debt of the said plaintiff and all right or rights of action thereon became extinguished. And this defendant saith the said judgment of forfeiture was executed by the delivery of the assets of said bank to said assignee, as provided, and the acceptance by said assignee of all the powers and duties conferred by said Acts of the Legislature.

Wherefore this defendant pleads the same, to wit: the said judgment of forfeiture, and the said Acts of the Legislature in bar of the said plaintiff's suit, and thereof prays judgment of the Court, and puts himself upon the country, &c.

6th. And for further plea in this behalf this defendant saith, *actio non*.

Because he saith that he is not, nor was he at the time of the commencement of said plaintiff's suit—nor was he when said right of action accrued—nor was he when the debts upon which the same is founded, were contracted—nor had he been for more than six years prior to either and each of said events, a stockholder in the said Planters' and Mechanics' Bank of Columbus, in any manner or form. Wherefore he saith that he is not in any manner liable to said plaintiff's suit, and therefore puts himself upon the country, &c.

7th. And for further plea said defendant saith, *actio non*.

Because he says that if he ever did owe in manner and form as said plaintiff hath above thereof complained against him, said causes of action, nor any of them did not accrue within four years next before the commencement of said plaintiff's suit, and this he is ready to verify, and therefore puts himself upon the country, &c.

8th. And for further plea in this behalf this defendant saith, *actio non*.

Because he says, that if he ever was at any time a stockholder in the said Planters' and Mechanics' Bank of Columbus, and as such, held any number of shares therein, the following is the account of his ownership thereof, as existing upon the books of said bank, showing the dates of its transfer to him, to wit:

February 20, 1838.—To stock transferred by M. W. Turner, 50 shares.

March 22, 1838.—To " " " A. B. Ragan, 50 shares.

and defendant farther says that he never owned, had, or held any other or further number of shares in said bank, than said one hundred shares as aforesaid, and if the books of said bank show any other or further transfer of shares of said bank stock to this defendant, to wit: a transfer on the 19th day of May, 1838, by Hines Holt, of 188 shares of said bank stock, and Walter T. Colquitt, of 188 shares of said bank stock, transferred to the name of the defendant, the same was so transferred by said Colquitt and Holt, at the instance of, and for the sole and exclusive benefit of one Daniel McDougald, and without the knowledge or consent of the defendant, and the same was so known to be the fact, then and there, by the directors and officers of said bank, and the defendant never did assent to the same. Defendant further says, that he never voted on said last mentioned stock, nor did any other act in relation to said last mentioned stock, by which his assent to such transfer could or can be implied, and so the defendant says, that he never owned, had or held, said three hundred and seventy-six shares of bank stock, so transferred by said Holt and Colquitt, to his name, as aforesaid, at the instance of said McDougald, and without the defendant's knowledge or assent as aforesaid, nor is he in any manner liable therefor, all of which he is ready to verify, and therefore puts himself on the country, &c.

9th. And for further plea in this behalf, this defendant saith, *ad id non*.

Because, he saith, that if he ever was a stockholder in said Planters' and Mechanics' Bank of Columbus, he became such stockholder, not by original subscription for said stock, nor by purchase in any manner, form, or by any contract with said bank, but by transfer from the persons named in the 8th above plea, herewith submitted, and that the said persons who so transferred said stock to him, if any liability exists thereon which can be enforced by the said plaintiff, remain subject to said liability, they not having given notice of said transfer, and the failure of said bank having occurred within six months of the date there-

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of; and therefore he saith that said transfers to him were not made in pursuance of the provisions of said bank charter, and so far as concerns the rights of the said plaintiff, are void.

Whereof this defendant saith, that he is not liable on said stock to the said plaintiff's demand, and thereof he puts himself upon the country, &c.

10th. And for further plea in this behalf, this defendant saith, *actio non*.

Because, he saith, that if he ever did own and hold in his own right, or otherwise, any number of shares of stock in the Planters' and Mechanics' Bank of Columbus, that said bank, while he owned and held the same, and when the said plaintiff's right of action accrued, and when the same was instituted, was not insolvent, nor is the same now insolvent, but on the contrary thereof, the same had during all the time aforesaid and still has assets and effects altogether ample and sufficient to redeem all its bills and notes, without resorting to the ultimate liability of its stockholders, as provided by its charter, for the redemption and payment thereof. For this defendant saith, that there remained unpaid from the stockholders of said bank, at the time of the debts of said plaintiff accruing, and at the time of the dissolution of the charter thereof, and at the time of the commencement of said actions, and is still unpaid as assets, and first liable to the payment of said demands and to be exhausted before the ultimate liability of this defendant is fixed, as sought to be enforced in said actions, the sum of seventy-five dollars on each and every share of the stock thereof, making in the whole amount thus due, the sum of seven hundred and fifty thousand dollars, to wit: the sum of seventy-five dollars per share, on twenty-five shares, by John Banks; the like sum on forty-five shares, by T. R. Gould, and on one share, by W. S. Chipley, and on one hundred shares by W. B. Ector, and on twenty shares by Abraham Key, and on fifty shares by J. B. Ghent, and on fifty-two shares by J. M. Foster, and on one hundred shares by H. T. Greenwood, and on one hundred shares by Thomas Berry, and on four hundred and ten shares by D. McDougald, and on one hundred shares by John Page, and on fifty shares by Hardy Crawford, and on

one hundred shares by John Peabody, and on one hundred shares by Lucas and Brooks, and on one hundred shares by Robinson and Marks, and on one hundred shares by Henry Harris, and on one hundred shares by Alexander J. Robison, and on thirty shares by James M. Chambers, and on three hundred shares by George Smith, and on fifty shares by Rhodom Green, and on one thousand seven hundred and fifty-three shares by James C. Watson, and on four hundred shares by Thos. W. Watson, and on one hundred shares by Holt and Persons, and on four hundred shares by D. P. Hillhouse, and on thirty shares by A. H. Flewellen, and on one hundred shares by Joel Hurt, sen. and on thirty shares by W. Boyd, and on twenty shares by R. T. Marks, and on sixty-nine shares by W. W. Robinson, and on fifty shares by Wm. Boyd, guardian, &c. and on three hundred shares by Robert Watson, and on three hundred shares by James A. Slaton, and on two hundred shares by Wm. Taylor, and on one hundred shares by N. G. Wood, and on two thousand four hundred and forty-five shares by B. W. Walker, and one thousand two hundred and twenty-two shares by A. A. Hawley. And this defendant saith, that said stockholders are solvent and within the jurisdiction of the Court, own an amount altogether sufficient to discharge all the demands of whatsoever character due and owing by said bank, and that the said plaintiff hath not prosecuted his claims against said assets. And this defendant further saith, that the said bank, before the forfeiture of its charter, to wit: on the 6th day of May, in the year 1843, made an assignment to one Robert B. Alexander, for the benefit of its creditors, of all its property, assets and effects, amounting, exclusive of the sum due as aforesaid from its stockholders, to the sum of \$391,340 93, all which will more fully appear by said deed of assignment, duly recorded, and duly recognized by Act of the Legislature of the State of Georgia, and that said property, assets and effects are all collectable and within jurisdiction of the Court, and are more than sufficient to discharge all debts due by said bank, and that the said plaintiff hath not prosecuted his claim against the same, and that said bank owes only the sum of \$50,000. And this defendant further saith,

that there is due and owing to said Planters' and Mechanics' Bank of Columbus, by the late Western Bank of Georgia in the bills thereof, the sum of \$40,000, which is collectable and within the jurisdiction of this Court, and that the said plaintiff hath not prosecuted his claim against the same, or levied on said bills.

And this defendant further saith, that there is real and personal estate belonging to said Planters' and Mechanics' Bank of Columbus, to the value of fifty thousand dollars, upon which the said plaintiff hath not levied his demand, and as part of the said estate there is the late banking house and lot occupied and owned by said bank at the time of the forfeiture of its charter, and a large three story brick building at the upper end of Broad street, in the City of Columbus, to wit: known as City lots, No. 186, and the north half of City lots, No. 183, and which is of the value as aforesaid, and which is subject to levy and sale under the said plaintiff's demand.

Wherefore this defendant saith, that his ultimate liability to the plaintiff's demand has not, if any exists, accrued, and of this he puts himself upon the country, &c.

11th. And for further plea in this behalf, this defendant saith, *actio non*.

Because he says, that if he ever did own and hold any stock in said bank, and in consequence thereof, is liable to the said plaintiff's demand, he is not liable to the extent claimed by said plaintiff in his said action, for he saith that the capital stock of said bank, if the same is estimated so far as concerns the said plaintiff's demand by the number of persons who held the same in similar circumstances with this defendant, was four million of dollars, and not one million, as provided by the charter, and that the liability *pro rata* of this suit is not as in said suit alleged, as the number of shares held by him is to one million of dollars, but as the same is to four million.

This plea farther set out the list of stockholders, during every six months of the existence of the bank, among which, did not appear the name of defendant. The plea concluded as follows:

And this defendant further says, that all and singular the transfer of said stock as set forth in this plea, was made by assignment and transfer, on the transfer books of said bank, and all and singular said assignment and transfer took place within six months prior to the failure of said bank, and while it was in the suspension of specie payment, and without giving, on the part of said stockholders and assignors as aforesaid, the sixty days' notice by publication in a public gazette of said State, as contemplated by the charter of said bank, in order to discharge such stockholders from liability on said stock, all of which he is ready to verify, and therefore puts himself on the country, &c.

12th. And for a further plea in this behalf, said defendant says, *actio non*.

Because, he says, that each and every one of the said stockholders, in the 11th plea mentioned, transferred the stock in said bank so by them held in said bank, as in said 11th plea more particularly set forth, and said Turner, Ragan, Holt and Colquitt, transferred said stock to them without giving the 60 days' notice of such transfer, in one of the public gazettes of this State, as required by the eleventh section of the charter of said bank, and that each and every of said stockholders so transferred said stock within six months prior to the failure of said bank. Whereupon this defendant saith, that to the extent that any shares of said stock may have been transferred to him, the same was transferred to him without being released or discharged of said liability, on the part of the assignor thereof to the bill-holders of said bank, and said liability attaching and remaining in such stockholders, does not in any manner attach upon such stocks in the hands of the defendant, assignee, as aforesaid, and of this he is ready to verify, and therefore prays judgment of the Court, &c. and thereof puts himself on the country, &c.

13th. And for a further plea, said defendant says, *actio non*.

Because, he says, that if at any time any of the stock of said bank was held in the name of this defendant, the same was transferred to him, and to his name, as particularly set forth in his foregoing plea, marked number 8, by A. B. Ragan, 50 shares, M. W. Turner, 50 shares, Hines Holt, 188 shares, and

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Walter T. Colquitt, 188 shares, and that neither said Turner, Ragan, Holt or Colquitt, gave the sixty days' notice of the said transfer of their said stock, in any of the public gazettes of said State, as required by the eleventh section of the charter of said bank, in order to discharge themselves from liability as such stockholders to the said plaintiff or other bill-holders of said bank, and said Turner, Ragan, Holt and Colquitt, each and all of them, made said transfer of their said stock to this defendant, to the name of this defendant, as aforesaid, within six months prior to the failure of said bank, and remain liable to said plaintiff and the other bill-holders of said bank, upon said transferred stock, and so remaining liable, said liability cannot, and does not, attach to said stock so held and owned by this defendant, and so transferred into the name of this defendant, as in said 8th plea mentioned and set forth. Whereupon this defendant says he is not liable to said plaintiff upon all or any of said stock, and which he is ready to verify, and prays judgment of the Court, &c. and thereof puts himself on the country, &c.

14th. And for a further plea in this behalf, said defendant says, *actio non*.

Because, he says, there is no such record of judgment against said Robert B. Alexander, assignee of said bank, as is set forth in said plaintiff's declaration, and this he is ready to verify, and prays judgment of the Court, and thereof puts himself on the country, &c.

15th. And for further plea in this behalf said defendant says, *actio non*.

Because, he says, that if there is any such judgment against said Robert B. Alexander, assignee of said bank, as in said plaintiff's declaration mentioned, the same is null, void, and of no effect, for want of jurisdiction in the said Court rendering the same, for that said Robert B. Alexander, at the time of the rendition of said judgment, was the presiding Judge of said Court rendering the same, and presided in said Court as the Judge thereof at the rendition of said judgment, and as such Judge, rendered said judgment to said plaintiff, and so said defendant says said judgment is, and was, at the rendition thereof, null

and void, and this he is ready to verify, and prays judgment, &c. and thereof puts himself on the country, &c.

16th. And for a further plea in this behalf, said defendant says, *actio non*.

Because, he says, that heretofore, to-wit: on the 1st day of July, 1841, said bank suspended specie payment and failed, and after such failure said plaintiff with a full knowledge thereof, and without the consent of this defendant, procured said bank to re-issue and pass out from said bank to said plaintiff, the bills in said plaintiff's declaration mentioned, and this he is ready to verify, and prays judgment of the Court, &c. and puts himself on the country, &c.

17th. And for further plea in this behalf, said defendant says, *actio non*.

Because, he says, that said plaintiff did not commence his said suit against said bank, or its said assignee, on all or any of the said bills in his said declaration mentioned, within six years next after the accrual of his cause of action therein against said bank, and this he is ready to verify, and prays judgment of the Court, &c. and puts himself on the country, &c.

18th. And for a further plea in this behalf, said defendant says, *actio non*.

Because, he says, that at the time said plaintiff commenced his said action against the assignee of said bank as in said plaintiff's declaration mentioned, all and singular said causes of action against said bank were barred by the Statute of Limitations, of six years, and said assignee well knowing the same, and in fraud of the rights of this defendant, waived said Statute bar, and neglected to plead and insist upon said Statute, and confessed said judgment upon said causes of action barred by the Statute of Limitation as aforesaid, all of which he is ready to verify, and prays judgment, &c. and puts himself on the country, &c.

19th. And for a further plea in this behalf, said defendant says, *actio non*.

Because, he says, that said plaintiff failed, refused and neglected to commence suits against said bank, or its assignee, on

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said several causes of action in said plaintiff's declaration mentioned, for more than six years next from and after the accrual of his said cause of action against said bank, and that said assignee to the full end and term of six years, and for a long time thereafter, to wit : at and until the 1st day of January, 1846, had and held of the property and assets of said bank, and subject to the payment of said plaintiff's said demand, sufficient for the payment thereof, to wit : the personal property and choses in action in said tenth plea mentioned, and five thousand dollars in cash, and afterwards, and before the said judgment, against the said assignee in said plaintiff's declaration mentioned, said assignee wasted the same, and said assignee knowing that said plaintiff's claim was thus barred by the Statute of Limitation, and that he had no funds or property of said bank with which to pay the same, and with a view of rendering this defendant liable to said claim, colluded with said plaintiff and failed and refused to plead or insist upon said Statute of Limitation as a bar, and confessed said judgment to said plaintiff, all of which he is ready to verify, and prays judgment, &c. and puts himself on the country, &c.

20th. And for further plea in this behalf said defendant says, *actio non*.

Because, he says, that said Robert B. Alexander, neither at the time of the commencement of said suit against him by said plaintiff, as assignee of said bank, nor at the time of the rendition of said judgment against him as such assignee, was not in truth and in fact, the assignee of said bank, and had no right or authority to be sued as such in the place and stead of said bank, which he is ready to verify, and prays judgment, &c. and puts himself on the country, &c.

HINES HOLT, Defendant's Attorney.

Before the cause was submitted to the Jury, the plaintiff demurred to, and moved to strike out as insufficient in law, and constituting no sufficient defence to plaintiff's demand, each and every of defendant's pleas as numbered, 1, 2, 3, 4, 5, 7, 9, 11, 12, 13, 14, and 15, and after argument had thereon, the presid-

ing Judge sustained said demurrer to each and every of said pleas, and ordered the same to be stricken out, which was accordingly done, and to which ruling and decision the defendant then and there excepted. The plaintiff then and there joining issue upon so much of the said defendant's plea, numbered 10, as set forth that there was real and personal property of said Planters' and Mechanics' bank, and specified the same, demurred to all those parts thereof which set forth the unpaid capital stock of said bank, and notes and other things in the hands of its assignee, &c. as assets against which plaintiff had not prosecuted his demand, &c. and after argument the presiding Judge sustained the demurrer and ordered plea (No. 10) to be stricken out to the extent to which the same was demurred to, which was accordingly done, and to which ruling and decision, defendant excepted.

The plaintiff having offered to join issue on pleas Nos. 1, 6, 8 and 16, and on that part of plea No. 10 not demurred to, as hereinbefore specified, the defendant before concluding said joinder, and before said cause was submitted to the Jury, by his counsel demurred to plaintiff's declaration, on the ground that there was no allegation therein averring that said Robert B. Alexander was ever appointed assignee of said bank, and no allegation showing that a judgment against the said Robert B. Alexander as such assignee, would be, was or is equivalent to a judgment against said bank, either by averment that the charter thereof had been judicially forfeited or otherwise surrendered, or by averment that the Act of the Legislature of the State of Georgia, assented to 23d December, 1842, entitled an Act to amend an Act to compel the several banks of this State to redeem their liabilities in specie, &c. was procured, accepted or assented to by said bank, or either or any of its stockholders; and also to the second count in said declaration, because the judgment against said Alexander, as assignee, is made the sole cause of action therein—no bills, notes, or other character of liability being set forth, other than said judgment, and that the said defendant is not liable thereon, that is to say, on said judgment. And after argument had on said demurrer, said Court overruled

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the same, so far as it pertained to the first count in said declaration, holding and deciding that the appointment of said Alexander, as assignee of said bank, being made by Act of 1843, is sufficient to render a judgment against him, as assignee, equivalent to a judgment against said bank ; to which ruling and decision the said defendant then and there excepted.

So far as concerned the demurrer to the second count in said declaration, the Court ruled that the same be sustained, and ordered said second count stricken therefrom, which was accordingly done.

The cause was then put before the Jury upon the issue taken, and that the said plaintiff offered and gave in evidence, the bank bills set forth in the first count of his declaration, and then offered in evidence the record of a suit, judgment and *fi. fa.* against Robert B. Alexander, assignee of said bank, with the entries and returns thereon.

The judgment and execution in this record, were as follows :

I confess judgment to the plaintiff for the sum of nineteen hundred and twenty-five dollars, with interest and cost, to be levied of the goods and chattels, rights and credits, lands and tenements of the said Planters' and Mechanics' Bank of Columbus.

ROBT. B. ALEXANDER,

Feb. 21st, 1848.

Assignee, &c.

Whereupon it is considered and adjudged by the Court that the plaintiff do recover of the defendant, as assignee of the Planters' and Mechanics' Bank of Columbus, the sum of nineteen hundred and twenty-five dollars for his principal debt, and the sum of seven hundred and seventy dollars for his interest, and the sum of ten 50-100 dollars for his costs, to be levied of the goods and chattels, rights and credits, lands and tenements of said bank.

WM. DOUGHERTY,

Plff's Atty.

February 8th, 1848.

GEORGIA, MUSCOGEE COUNTY.

To all and singular the Sheriffs of said State—Greeting :

We command you that of the goods and chattels, lands and tenements of Robert B. Alexander, as assignee of the Planters' and Mechanics' Bank of Columbus, you cause to be made the sum of nineteen hundred and twenty-five dollars principal, and the further sum of seven hundred and seventy-seven dollars interest up to the 8th day of February, 1848, and also the further sum of ten dollars and fifty cents for costs, with interest on the principal sum from the 8th day of February, 1848, which Richard A. Lane lately in our Superior Court of said County recovered against the said defendant, as assignee of the Planters' and Mechanics' Bank of Columbus, for his principal, interest and cost; and that you have the said several sums of money before the Judge of our said Court on the second Monday in May next, to render to the said plaintiff the principal, interest and cost aforesaid, and have you there this writ.

Witness the Honorable Robert B. Alexander, Judge of our said Court.

E. J. HARDEN, *Clerk*.

This, 18th day of Feb., 1848.

No property to be found subject to this *fi. fa.*

A. S. RUTHERFORD, *Sheriff*.

March 17th, 1848.

To the introduction thereof in evidence, the defendant objected, on the ground that in the then state of the pleadings, the same was irrelevant, relying amongst other things upon the positions that in said plaintiff's declaration it was alleged that the said Bank was still in existence, and that it was not alleged how, when or by what means Alexander became assignee, or that he was assignee with or without any such power as to deprive said bank of its franchises to sue and be sued and confer said right upon him. The objection to the introduction of said records was sustained by the Court, and the same ruled inadmissible, and thereupon the plaintiff asked and obtained leave to

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amend his declaration, and upon said leave, inserted as a part thereof the following :

RICHARD A. LANE,	}	Debt, in Muscogee Superior Court, at November Adjourned Term, 1851.
vs.		
DOZIER THORNTON.		

The plaintiff amends his declaration by leave of the Court, by adding the following account, to come in after the account on the second page of his declaration, to wit: Your petitioner further avers that on the thirteenth day of June, 1843, the charter of the said Planters' and Mechanics' Bank of Columbus was, by the judgment of the Superior Court of Muscogee County, on a writ of *quo warranto*, declared and adjudged forfeited and annulled by the following judgment of said Court, to wit: It is considered by the Court here that the liberties, privileges and franchises, to wit, that of being a body politic and corporate by the name and style of the Planters' and Mechanics' Bank of Columbus, heretofore used and seized and exercised by the defendant, be seized into the hands of the State, and that the said defendant do not in any manner hereafter intermeddle, use, have, enjoy or exercise any of the liberties, franchises or privileges of a body politic or corporate, but that the said defendant be absolutely forejudged and excluded from holding, using or exercising any of the privileges, franchises or liberties of a body politic or corporate, and that the State recover its costs to be taxed. And your petitioner further avers that by the Act of the Legislature passed on the 23d day of Dec. 1843, one Rob't B. Alexander was appointed and recognized as assignee and receiver of said Planters' and Mechanics' Bank of Columbus, with power to sue for any demand due to said Bank, and to be sued for any demand due from said Bank.

Upon said amendment being offered and received as part of said declaration, the defendant again demurred to the same as amended, as being in its then state insufficient in law to charge him, and as cause of demurrer amongst other things alleged :

1st. That said plaintiff in his said declaration showed that he had no cause of action either against said Bank, its assignee or

its stockholders, or in any other form; he having shown therein by setting forth said judgment of forfeiture so absolute and unqualified in its terms, and without any of the savings and exceptions contemplated and directed by the Act of 1842, and that the same was still subsisting and unreserved *its extinguishment*.

2nd. That said cause of action being thus extinguished by a judgment of forfeiture so absolute in its terms as that set forth by said plaintiff in his said declaration, the Act of the 23d December, 1843, could not and did not revive it, either in the hands of said assignee or in any other form.

3d. That if said plaintiff took or assumed to take any right of action or otherwise under said Act of 23d December, 1843, and the several Acts of which the same was amendatory, he must take said rights only upon the terms and qualifications of said Acts, and that by said Acts the right of action and recovery was in said assignee, upon terms in said Acts fully specified, and could not exist in or be prosecuted by said plaintiff. After argument had upon said demurrer the same was overruled. To which ruling and decision the defendant then and there excepted.

The defendant then to the declaration as amended pleaded the pleas as contained in the list of pleas hereinbefore copied and numbered 3 and 7, and stricken out upon demurrer when offered before the amendments to said declaration; and also the several additional pleas found upon said list, and numbered 17, 18, 19 and 20; and thereupon the plaintiff demurred severally to each of said pleas numbered 3, 7, 18 and 20, and after argument upon said demurrer the same was sustained, and said pleas and each of them ordered to be stricken out, which was accordingly done. To which ruling and decision the defendant then and there excepted.

The plaintiff then read in evidence to the Jury the record of said suit against said Alexander, and the judgment thereon, with all the entries on the same, which is hereinbefore fully set forth. The plaintiff then proposed to read in evidence to the Jury said *fi. fa.* hereinbefore copied, with its entries. Thereupon the defendant objected to the reading of the same, amongst other things, because said *fi. fa.* did not follow and correspond with

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the judgment and confession of judgment from which the same purported to issue, in this, that said confession and judgment was against the goods and chattels, rights and credits, lands and tenements of said bank, &c., therein specified to be levied thereon; and that said *fi. fa.* was against the goods and chattels, lands and tenements of Alexander, as assignee; and in this, that the return of *Nulla Bona* thereon was premature, having been made before the return day of said *fi. fa.* which objections were overruled, and to which defendant excepted.

The plaintiff then introduced as a witness in said cause, one Abraham B. Ragan, who being sworn, testified that he was Cashier of said Planters' and Mechanics' Bank of Columbus at its first organization, late in the winter or early in the spring of 1837, and that he continued in office until the spring of 1838; that the book offered and shown to him by the plaintiff's counsel was the transfer stock book of the Planters and Mechanics' Bank of Columbus, kept by the Bank for the purpose of transferring stock from one stockholder to another on said book. The witness proved the following transfers:

I, A. B. Ragan, do hereby assign and transfer fifty shares in the capital or joint stock of the Planters' and Mechanics' Bank of Columbus, to Dozier Thornton, Jr., for value received. In witness whereof, I have hereunto set my hand, in the town of Columbus, the 28th day of March, 1838.

A. B. RAGAN.

Witness, A. B. RAGAN, *Cash'r.*

I, Hines Holt, Jr., do hereby assign and transfer one hundred and eighty-eight shares in the capital and joint stock of the Planters' and Mechanics' Bank of Columbus, to Dozier Thornton, Jr. In witness whereof, I have hereunto set my hand, in the town of Columbus, the 19th day of May, 1838.

HINES HOLT, Jr.

Witness, A. B. RAGAN, *Cash'r.*

I, Walter T. Colquitt, do hereby assign and transfer one hun-

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dred and eighty-eight shares in the capital or joint stock of the Planters' and Mechanics' Bank of Columbus, to Dozier Thornton, Jr. In witness whereof, I have hereunto set my hand, in in the town of Columbus, the 19th day of May, 1838.

W. T. COLQUITT.

Witness, A. B. RAGAN, *Cash'r.*

Witness testified that he transferred the fifty shares, and that he recognized his signature as a witness to the other transfers, and has no doubt they were made by Holt and Colquitt, as it was his duty as Cashier to witness such transfers, and he was not in the habit of subscribing his name as witness unless the transfers were made as recorded, but had no recollection of the same, or that defendant was or was not present when the same were made, or then or afterwards assented to them. He also testified that when said bank was organized all its stock was subscribed for, and that 25 per cent. thereon was paid; that a large portion of said payment was made in specie certificates of deposit given by the Bank of Columbus and the Insurance Bank of Columbus; that a committee of stockholders made arrangements with those Banks to give specie certificates for the notes and bills of the stockholders in the Planters' and Mechanics' Bank; that said bank did no business in 1837, and after its organization resolved to do none until the fall of that year, and a resolution was passed to discount the notes of its stockholders to the amount of their stock less about 2 per cent. for contingent expenses, respectively making said notes due 1st October, 1837; and that if said stockholders did not borrow upon these terms, others might, and this arrangement was carried out mainly if not entirely to stockholders; that the first bills issued by said bank were dated 6th February, 1838, and then were commenced to be put into circulation a week or ten days thereafter and then banking business commenced. When this banking business was determined upon and commenced, the stockholders and others who had given notes as before testified to, were required to pay in 50 per cent. thereon, which payment was made in bank bills of suspended banks, and not in specie. At the time bills were first

issued by said bank, it had but little specie on hand or in its vault, not exceeding \$800 or \$1,000. Said bank made three issues of bills in 1838, the first of \$50,000, the second of \$150,000, and the third of \$80 or 100,000. It commenced business as a suspended bank, and paid no specie whilst he was connected with it as Cashier, except small amounts for change. During the examination of said witness, defendant's counsel asked if there was not between 1837 and 1838 a change of stockholders and directors to a large extent; to which question plaintiff's counsel objected, and which objection was sustained—the Court deciding that the transfer book was higher evidence of that fact, and that it could not be proven by parol; to which ruling and decision defendant's counsel then and there excepted. Said witness further testified that Gen. Samuel A. Bailey was the first President of said bank, and that Gen. Daniel McDougald was President when the same commenced business in 1838. Before or about the time, and soon after said bank commenced business, McDougald purchased a large number of the shares of its stock, amounting in number to a majority of said stock, and witness knows that stock so purchased was transferred by direction of McDougald to or in the names of other persons; does not know that the shares transferred by Holt and Colquitt were purchased by McDougald.

He knows nothing of said transfers by Holt and Colquitt, except that he witnessed them, and this only from seeing his name as witness. He does not know that defendant was present or knew of said transfer. Witness further testified that he is now assignee or receiver of said Planters' and Mechanics' Bank of Columbus.

Defendant's counsel then asked witness whether, at the time the forfeiture of the charter of said bank occurred, 13th June, 1843, its assets were not sufficient to meet its liabilities, and whether he had not become satisfied of this fact, from knowledge of said assets, derived since his appointment as receiver, and whether said assets are not now to a large extent in his hands as receiver or assignee. To all the parts of said question and as an entire question, plaintiff's counsel objected,

and said objection was sustained, and to which ruling defendant's counsel excepted.

Defendant's counsel then asked said witness whether the unpaid capital stock and assets combined were not sufficient, by more than half a million of dollars, to pay all the debts and liabilities of said bank at the forfeiture of its charter; to which question, and the same being answered, plaintiff objected, and said objection was sustained by the Court, and to which defendant excepted. Witness further testified that he had in his hands, as assignee or receiver, promissory notes to the amount of \$131,000, and \$40,000 of the bills of the Western Bank of Georgia. Plaintiff's counsel then asked witness if said promissory notes had not been past due more than six years before he received the same; to which question defendant's counsel objected, and said objection was overruled, and thereupon defendant's counsel excepted. Witness then testified that all of said notes, except one for about \$900, payable in the bills of the bank, had been past due more than six years before he received them; that he was appointed assignee at the May Term of this Court, 1851, and since then had received said notes and bills of Joseph A. L. Lee, who turned them over to him as the assignee of said bank.

Witness further testified that said bank, in 1838, built a banking house in said City of Columbus, on the west side of Broad street, and occupied the same up to the time of its final failure in the Spring of 1843. Since that time said banking house had been in possession of John Banks, the agency of the Bank of Brunswick, Alfred Iverson and others. Plaintiff's counsel then proposed to read in evidence to the Jury the three transfers hereinbefore copied from said transfer book, and to which defendant's counsel objected unless the whole book containing said transfers was offered and permitted to go in evidence, or so much thereof as either party chose to use as evidence before said Jury; which objection was overruled by the Court, and to which defendant's counsel excepted. Said three transfers were then read in evidence to the Jury. Said Ragan-

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also testified that said banking house and lot was worth from 12 to \$15,000.

And be it further remembered, that the said plaintiff then read in evidence the record of an information in the nature of a *quo warranto*, against the Planters' and Mechanics' Bank, for the purpose of forfeiting its charter; by which the following judgment appeared to have been rendered:

THE STATE OF GEORGIA, vs. PLANTERS' AND MECHANICS' BANK OF COLUMBUS.	}	Information in the nature of a <i>quo warranto</i> .
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It is considered by the Court here, that the liberties, privileges and franchises, to wit, that of being a body politic and corporate, by the name and style of the Planters' and Mechanics' Bank of Columbus, heretofore used, enjoyed and exercised by the defendant, be seized into the hands of the State, and that the said defendant do not in any manner hereafter intermeddle, use, have, enjoy, or exercise any of the liberties, privileges or franchises of a body politic or corporate, but that the said defendant be absolutely forejudged and excluded from holding, using or exercising any of the privileges, franchises or liberties of a body corporate or politic, and that the State recover its costs to be taxed.

The plaintiff then closed his case, and the defendant introducing no evidence, the same was argued before the Jury, and after argument, the Judge charged the Jury amongst other things, that the transfer of stock in the stock book of said bank to the defendant, was *prima facie* evidence of his ownership thereof, and that it was not necessary to the plaintiff's recovery that he should prove the same by other evidence, or that he should prove defendant's purchase or subscription for the same, or his assent or knowledge of said transfers in his name or to him; that said transfer being made on the books of said bank, kept and used for said purpose, his assent thereto would be presumed; and that it was incumbent on the defendant to plead

and prove that he did not own the same, and that it was for the Jury to decide (if at all) how far the evidence had rebutted such presumptive evidence on the said transfer book, and if it had been rebutted, then the defendant was not liable as the owner of said stock.

The Judge further charged the Jury that said defendant was liable to billholders to the extent of the value of each and every share of stock held by him, and in proportion as the number of his shares is to the whole number of shares of the bank; and that said defendant after paying billholders in this proportion to the extent of the value of each and every of his shares, at \$100 per share, could plead said payment in discharge of further claim by, or liability to other billholders, and that it was not necessary to the said plaintiff's recovery in his action, that he should aver and prove the extent of bills and notes issued by said bank and outstanding; that whether the same was \$250,000, 1 million, or 3 millions, it made no difference as to defendant's liability; that when the defendant had paid billholders to the extent of his liability, such payment was ample protection against the claims upon him of other billholders; that the amount of bills and notes unredeemed by said bank was not an element in the calculation of the extent of defendant's liability to said plaintiff, and if it was, it was matter for plea and proof by said defendant, and not necessary to be averred and proven as part of said plaintiff's case, or in any manner necessary to his recovery. The Judge further charged the Jury that the defendant's liability as stockholder to said plaintiff accrued whenever the plaintiff's *legal remedies* against said bank for the payment of the bills held by him were exhausted, to wit, a judgment against the assignee and return of *nulla bona*; that it was not necessary for plaintiff to go into Equity to exhaust equitable assets or to pursue the assets in the receiver's hands (if any) before he could go upon the stockholder for a *pro rata* share of his debt.

The Judge further charged the Jury that the Act of the 23d December, 1843, expressly appointed Robert B. Alexander assignee of said bank, and that the same being a public law, it

was not incumbent on said plaintiff otherwise to aver and prove said appointment, and that the judgment against said assignee, *fi. fa.* and return of *nulla bona* thereon, was equivalent to the same being against said bank, and that a return of *nulla bona* on said *fi. fa.* against the assignee was *prima facie* evidence of the exhaustion of the property of said bank, but was not conclusive. If the defendant had shown that at the time of said return, there was property of said bank subject to levy and sale under said *fi. fa.* then said plaintiff must dismiss the suit against said defendant and proceed against said property, and could not maintain his action against defendant until he had exhausted such property.

The Judge further charged the Jury that the return of *nulla bona* on said *fi. fa.* against the assignee, even though made before the return day of the *fi. fa.* was *prima facie* evidence of there being no property upon which to levy the same, and that it was not necessary that the Sheriff should have retained in his hands said *fi. fa.* until the return day thereof.

The Judge further charged the Jury that if mere possession of the banking house and lot was relied upon by the defendant as *prima facie* evidence of title in said bank or its assignee, then such possession must have continued up to, or subsequent to the rendition of the judgment against said assignee; that in order for such possession to be any evidence of title, it was incumbent on the defendant to prove the same in said bank or the assignee, or that the persons in possession held under him or subsequent to the date of the judgment.

The Judge in the course of this charge to the Jury, amongst other things said, that the presiding Judge (the Court) was constituted by law the judge of the law in civil cases; that the Jury was bound to regard the law as stated by him to be the law of the case; that if he decided wrong, and the law provided a remedy or correcting tribunal, then his decision might be reviewed and corrected. If there was no corrective provided by law, then the parties would have to submit; but in either case it was wise and proper that the Judge should be entrusted with the power to determine the law, and that it was the province and

duty of the Jury to apply the law given in charge to them by the Court to the evidence, and find accordingly; that in this case he (the Judge) had given them in charge the law of the case as he understood it. The counsel on both sides had stated their views of the law and had claimed to give their honest opinions; the Court had no doubt that they were sincere and honest in the expression of their opinions; he claimed however, to be equally sincere and honest in the opinions expressed by him; that he was certainly indifferent in feeling to the parties, and had no earthly interest in the case, although he regretted to say that he had the evening before, received through the Post Office an anonymous letter, charging him with corruption, and being the partner of Mr. Dougherty in these bank cases, and threatening personal violence to him; that he hoped none of the defendants to said bank cases had written that letter; one thing was certain, no honorable man had written it; those are most apt to be suspicious who were themselves corrupt; he (the Judge) had important official duties to perform under the sanction of an oath—he would perform them fearlessly and to the best of his ability, no matter who was pleased or displeased thereby.

At the conclusion of the charge, and at the hour of 9 o'clock, A. M., the Jury retired to consider of their verdict, and after remaining in their room until 2 o'clock, P. M., again returned at their own request to the Court room, to receive the further instructions and charge of the Judge, and reported through their Foreman, that they disagreed as to the effect of the testimony of the witness Ragan, with regard to the assets turned over to him by Mr. Lee, and whether said testimony was ruled out or was before them for their consideration.

The Judge then and there charged the Jury that said evidence was not ruled out, and was before them, and that the legal effect thereof was not to defeat the recovery of the plaintiff, unless it proved property the subject of levy and sale under the *fi. fa.* against Alexander as assignee, and that a return of *nulla bona* on said *fi. fa.* was evidence of the insolvency of said bank, sufficient to give billholders their remedy against stockholders.

And that the mere fact that said Ragan received notes, &c.,

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from said Lee, was not sufficient to prove the same the assets of said bank, but that to establish the fact that they were the property of said bank, it must be proved that they were held by the bank or had been derived from a previous assignee of the bank, as assets of the bank.

To all of which said charge and to each of them as severally and specifically given, and to said entire charge, the said defendant then and there excepted.

Upon these several exceptions error is assigned.

H. HOLT, TOOMBS, with whom were B. HILL and COLQUITT, for plaintiff in error.

LAW & BERRIEN, with whom was W. DOUGHERTY, for defendant in error.*

The following authorities were cited by H. HOLT, for plaintiff in error :

Prince's Digest, 124. *Pam. Acts of 1840*, 27 and 8; 1841, 29; 1842, 29; 1843, 21. *McDougald vs. Central Bank*, 3 Kelly, 185. 1 *Bla. Comm.* 484. 2 *Kent's Com.* 3d edition, 307. *Angel & Ames on Cor.* 751. *Mayor, &c. of Colchester vs. Seaber, Ex'r. &c.*, 3 Burr, 1866. *King vs. Amery and Monk*, 2 D. & E. 515. *King vs. Passmore*, 3 D. & E. 199. 3 *Kent's Comm.* 309. 2 *Story Eq. J. sec.* 1252. *Mumma vs. the Pot Co.* 8 Pet. 281. *Wood et al. vs. Dummer et al.* 3 Mason, 308. *Vose vs. Grant*, 15 Mass. 505. *Spear vs. Grant*, 16 Mass. 9. *Curson vs. the African Co.* 1 *Vernon's Cases*, 121. *Briggs et al. vs. Penniman et al.* 8 Cowen, 387. 2 *Kent's Com.* 307, note A. *Ib.* 312. *Slee vs. Bloom*, 5 J. Ch. R. 366. *Ib.* 19 J. R. 456. *Hasletts, Ex'r. vs. Witherspoon et al.* 2 Rich. Eq. Rep. 295. *Nevitt vs. the Bank of Port Gibson*, 6 Sm. & M. Rep. 513.

* The Reporter regrets that an Act of the Legislature debars him from inserting an abstract of the argument in this cause.

2 *Kent's Com.* 307. *Com. Bank of Rodney vs. the State of Mississippi*, 4 S. & M. 440. *Com. Bank Natchez vs. Chambers et al.* 8 S. & M. 9. *Campbell et al. vs. the Mississippi Union Bank*, 6 How. Miss. R. 625. *Bank of Miss. vs. Wren*, 3 S. & M. 791. *Pres. &c. of Port Gibson vs. Moore*, 13 S. & M. 791. *Lewis vs. Robertson*, *Ib.* 558. *King vs. Elliott*, 3 S. & M. 428. *Allen et al. vs. Mont. R. R. Company et al.* 11 Ala. R. N. S. 437. *Paschall vs. Whitsitt*, *Ib.* 472. *Bleakney et al. vs. Farmer's and Mechanic's Bank, Greencastle*, 17 S. & R. 64. *Dr. Salmon vs. the Humborough Co.* 1 Ch. Cases, 204. *Fox vs. Horah*, 1 Ire. Eq. R. 358. *White vs. Campbell et al.* 5 Hum. T. R. 38. 3 Bla. Com. 429. 1 *Harrison's Ch.* 67. 1 *Story Eq. J. ch.* 1 sec. 8 to 21. *Bank of Miss. vs. Wren*, 3 S. & M. 791. *Lennox vs. Roberts*, 2 *Wheat.* 373. *Jemison vs. Plan. Bank Mobile*, 17 Ala. N. S. 754. *Saltmarsh vs. the same Bank. Nathan vs. Whitlock*, 9 *Page*, 152. *Talmage, Pres. vs. Pell and Wife. In. re. the City Bank of Buffalo*, 10 *Page*, 378. *Brace vs. Bishop*, 3 *Wend.* 13. *Gullet vs. Fairchild*, 4 *Denio*, 80. *In. re. Fenelon & McMartins*, *Pet.* 7, *Barr.* 173. *Devans vs. Ding*, *Ch. T.* 10 *Barr.* 174. *Seward vs. Graves et al.* 10 *M. & W.* 711. *Martin vs. Trustees Belmont Bank*, 13 *Ohio*, 250. *Burnell vs. Bk. W. Union*, *Ib.* 298. *Miami. Ex. Co. vs. Gaono et al.* *Ib.* 269. *Hall et al. vs. Carey, assignee*, 5 *Ga. R.* 239. *Carey vs. Green*, 7 *Ga. R.* 80. *Young et al. vs. Harrison et al.* 6 *Ga. R.* 130. *Brown vs. Chaney*, 1 *Kelly*, 412. *Kenan & Rockwell vs. Miller*, 2 *Kelly*, 325. *Napier vs. Neal*, 3 *Kelly*, 301. *Rodgers vs. Evans*, 8 *Ga. R.* 145. *Wiley, Parish & Co. vs. Kelsey et al.* 9 *Ga. R.* 117. *Preston vs. Clark*, 9 *Ga. Rep.* 244. *Biggers, Mobley et al. vs. Mobley*, 9 *Ga. Rep.* 247. *An. and A. on Cor.* 555. *Marcy vs. Clark*, 17 *Mass.* 331. 1, 2 and 3, *Rev. St. N. Y. Rev. St. Mass.* 31, '2, et seq. *Rev. St. Maine*, 750. *Clayton's Digest*, 270, 344. *A. & A. on Cor.* 4. *Lane vs. Morris*, 8 *Ga. Rep.* 468. *McChuney vs.*

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Silliman, 3 *Pet.* 270. *Wynn vs. Lee*, 5 *Ga. R.* 217. *Lane vs. Morris*, 10 *Ga. R.* 152. *Clayton's Dig.* 270, 344. *Prince's Dig.* 375, '7. *Young et al. vs. Harrison et al.* 6 *Ga. R.* 156. *Bailey & Storm vs. Bancker*, 3 *Hill's N. Y. R.* 188. *Moss vs. McCullough*, 5 *Ibid.*, 131. *Jones vs. Pope*, 1 *Saun.* 37. *Watson on Sheriff*, 143. *Rex vs. Vice, Ch. Cam.* 3 *Burr.* 1661. *Rex vs. Dr. Askew*, 4 *Burr.* 2200. *Ellis vs. Marshall*, 2 *Mass.* 279. *Fletcher vs. Peck*, 6 *Cranch*, 9. *Wat. Dig.* 559, '60. *Hightower vs. Thornton*, 8 *Ga. R.* 492. 1 *Blac. Com.* '29, '30. *Prince's Dig.* 462. *Thompson vs. Central Bank*, 9 *Ga. R.* 415. *Collins vs. Blantern*, 2 *Wilson's R.* 348. *Adopting Act, Cobb's Dig.* 721. *Bacon Ab. title Stat. Hale's Hist. Com. Law*, 68. *Walker vs. Scudder*, 1 *Kelly*, 132. *South Sea Company vs. Wymondsell*, 3 *Peere Wms.* 143. *Murray vs. E. In. Co.* 5 *Barn. & Ald.* 204. *Bullard vs. Bell*, 1 *Mason*, 243. *Dartmouth College vs. Woodward*, 4 *Wheat.* 518. *Charles Riv. Br. vs. Warren Br.* 11 *Pet.* 420. *Mar. & Cr. Dig.* 33. *Angel on Lim. Ap.* 5. *Johnson et al. vs. Lancaster*, 5 *Ga. R.* 47. *Dickinson vs. McCamy*, 5 *Ga. R.* 488. 2 *Bla. Com.* 465. *Tomlin Law Dic. title Specialty.* *Bouviere*, 2 *S. & R.* 503. 1 *Burr.* 261. *Wills*, 189. 1 *Peere Wms.* 130. *Br. B'k Ala. vs. Kirkpatrick*, 5 *Ga. R.* 36. 4 *Burr.* 1963. 1 *D. & E.* 291. *Lawler et al. vs. Walker et al.* 18 *Ohio R.* 151. *Corning & Horner vs. McCullough*, 1 *Com.* 47. *Jackson vs. Sackett*, 7 *Wendell*, 94. *Clarke vs. Figes*, 2 *Starkie*, 234. *Martin vs. Broach*, 9 *Ga. R.* 21. *Bird vs. Adams*, 7 *Ga. R.* 505. *Smith vs. Lewis*, 9 *Ga. R.* 418. 1 *Kent's Com.* 468. 1 *Leigh's Nisi Prius*, 8. *Thalimer vs. Brinkerhoof*, 20 *J. R.* 397. *Bank U. S. vs. Owens*, 2 *Pet.* 27. *Lumpkin et al. vs. Jones*, 1 *Kelly*, 27. *Bond vs. Appleton*, 8 *Mass.* 472. *Curtis vs. Harlow*, 12 *Met.* 3. *Middleton Bank vs. Magil*, 5 *Conn.* 28. *Moss vs. Oakley*, 2 *Hill's N. Y. R.* 265. *McCullough vs. Moss*, 5 *Hill's N. Y. R.* 569. *Adderly vs. Storm*, 6 *Ibid.*, 624. *Worrall vs. Judson*, 5 *Barbour S. C. R.* 210.

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Gray vs. Portland Bank, 3 Mass. 379. *A. & A. on Cor.* 500. *Ward vs. Griswoldville Manufacturing Co.* 16 Conn. 593. *Minor et al. vs. Mech. Bk. Alex.* 1 Pet. 46. *Geo. Railroad vs. Harris*, 5 Ga. R. 527. *Towns, Governor, &c. use, &c. vs. Springer*, 9 Ga. R. 130. *Mobley et al. vs. Mobley, Adm. Ibid.*, 247. 1 Salkeld, 196. *Civitas London vs. Wood*, 12 Mod. R. 669. *Taylor vs. Smith*, 4 Ga. R. 133. *Echols and Wife vs. Barrett*, 6 Ga. R. 443. *Dougherty vs. Bethune*, 7 Ibid, 90. *Salem Mill dam Cor. vs. Ropes*, 9 Pick. 187. *Jenkins vs. Union T. Co.* 1 Caine's Cases in Error, 86. *Goshen T. Co. vs. Hunter*, 9 J. R. 218. *Highland T. Co. vs. McKean*, 11 J. R. 98. *Hibernian T. R. vs. Henderson*, 8 S. & R. 219. *Monroe vs. The State*, 5 Ga. R. 86.

By the Court.—LUMPKIN, J. delivering the opinion.

After the time spent in the re-argument of this cause, the complaint will not be reiterated, I trust, that the questions involved have been decided with "*constitutional haste*," whatever other objections may be urged against the judgment.

We have listened *patiently* at least, if not with unmixed pleasure, to eight elaborate arguments, occupying more than as many days, on questions, some of which have never been disputed, and most of them heretofore solemnly adjudicated by this Court.

[1.] As to the right of a party to re-assign upon another writ of error in the same case, points which have already been determined, we wish the position of this Court to be distinctly understood; and this is rendered the more necessary, from the fact, that its own authority is invoked for the new feature, now for the first time to be engrafted in our judicial system. Let it not be supposed for a moment, that parties are entitled to this privilege as matter of *right*; and that if it be conceded in any case, it is of *favor only*.

In the writ of error before us, we have not deemed it advisa-

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ble to arrest the discussion, for the reason, that when these bank cases came up two years ago, we had not a full Court; and they were new in practice, if not in principle, in this State. Hence, we were willing to submit to a re-argument of them. We need not say, however, that when questions have been once decided by this Court, they are to be considered as the law of the land, and respected and carried into full effect as such, the same as a Statute of the State; and that we will not in future, entertain a writ of error at the instance of the same party, except by leave, involving points which have been already distinctly settled. And this license will be grudgingly granted, appreciating, as we do, the importance of having it understood, that the law is *stable*. It is only in *extreme cases* that a Court in the last resort should permit its judgments to be drawn into controversy. The doctrine of *stare-decisis*, is right, both upon policy and principle.

Say the Constitutional Court of South Carolina, in the *State vs. Deleisseline*, (1 *McCord*, 52,) "the importance of adhering to decisions of this Court, is becoming more and more manifest every day. A greater evil can scarcely attend a Court in the last resort, than that its decisions should be unstable and fluctuating. The very object of such a Court is to give certainty to what before was uncertain. Its decisions become a rule of property and a rule of conduct," (and I would add, of *legislation* too, as the several bank charters recently granted in this State will show,) "and ought to receive such support as to secure to them, the unbroken confidence of the community." The learned Judge who delivered this opinion, added, "that such was the respect entertained by the Bench of that State, for their own decisions, that after ten years' experience, he knew but *one case* where the Court had undertaken to review and reverse a former decision." And we will not be understood, of course, as denying to parties who have never been before the Court, the privilege of prosecuting a writ of error for the purpose of reversing *any* decision, sentence, judgment or decree, of any Superior Court of this State.

Much sympathy has been expressed for the Court during this

discussion, (a fashion not unfrequent *at this bar*,) for the "constitutional haste" with which it is compelled to decide cases. *Personally*, its members are entitled to this sympathy; for our peculiar organization imposes upon us, an amount of labor, bodily and mental, without a parallel in any other appellate tribunal in the world. But if it be designed by this to weaken the force of the decisions themselves, *as law*, then however kindly intended, we must respectfully decline the apology thus *volunteered* in our behalf.

Both observation and experience teach, that the human mind acts with increased power according to the pressure put upon it. Give it time and it acts slowly. Force it to decide promptly, as the General is required to do on the battle-field, and the statesman in the midst of revolutions, and the same mind will do the work of a month in a moment; and what is more, will do it better. True, the effect upon the individual himself, is most exhausting, but the public does not suffer.

Let cases then be properly prepared and argued—and none should be brought up that are not—and concentrating as we are compelled to do, all of our intellectual and physical energies, in the brief space of time allotted for the purpose, the determinations are made, and in my humble judgment, neither the parties nor the public have just cause of complaint, that more space was not allowed for consultation.

It is reward enough for all our toils and sacrifices, the extent of which are known only to ourselves, that the administration of each of the present incumbents, such as it is, has received the almost unanimous approval of a generous profession and a just people. With this verdict we are satisfied; and proudly plead it in bar of all that is said or *insinuated*, openly or covertly, to our prejudice.

[2.] Why so much time and talent, labor and learning, have been employed to establish a proposition which nobody denies, viz: that the debts of a corporation, either to or from it, are extinguished by its dissolution, I am at a loss to comprehend. Certain it is, that it was recognized by this Court at this place

two years ago, as it had been on more than one occasion previously.

In *Hightower vs. Thornton and others*, (8 Ga. R. 486,) this Court say, "upon the threshold of this argument, we are met with the Common Law principle, that upon the dissolution of a corporation, all the debts due to and from it, are extinguished. A doctrine which results necessarily from the fact, that the corporation having expired, whether by its own limitation, by surrender, abandonment of its members, or judgment of dissolution, there is no one in law to sue or be sued."

That this doctrine is "*odious*," is evidenced by the fact, that a majority of the American States have already by their "enlightened legislation" "interposed to prevent, to ward off, the iniquitous consequences" of this Common Law rule; the existence of which, I take it upon myself to affirm, is "a disgrace to a civilized State." Georgia is not obnoxious to this reproach, so far as this corporation and others in its vicinity, *in pari delicto*, are concerned. She has made ample provision to rescue them from the operation of this rule. Such being the rule however, and the foundation of it, this Court does not feel itself called on to extend it one jot or tittle, beyond the reason which gave it birth.

It is asserted with great confidence, that "the legislation of no country could present a bloodier legal picture." "The annals of jurisprudence do not afford a parallel to such an assumption," as the liability of the stockholder to the bill-holder, which is here sought to be enforced. But strip this picture of the boldness of its outline, its gaudy coloring, and what are the naked facts, as they stand revealed upon this record?

A bank charter is created with a capital stock of a million of dollars, two hundred and fifty thousand of which are required to be paid *in specie*, before any bills are issued.

[3.] By the 14th section of the charter, it is enacted, that for the well ordering of the affairs of said corporation, there shall be seven directors, who shall be elected as soon as the sum of two hundred and fifty thousand dollars *in specie*, shall have been paid in by the stockholders of the bank; and the President,

directors and cashier are hereby *expressly inhibited* from the issuing of their bank notes, until they have officially and under oath, notified to the Governor that the provisions of the charter, in this respect, have been *literally and strictly* complied with. *Prin.* 125, 126.

By one of the fundamental articles of this corporation, it is provided, that the total amount of debts which the company shall at any time owe, whether by bond, bill, note, or other security, shall not exceed three times the amount of their capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe keeping; that in case of excess, the directors under whose administration it shall happen, shall be liable for the same *in their private and individual capacity*, and may be sued for the same in any Court of Record in the United States, *by any creditor of the corporation*, any condition, averment or agreement to the contrary notwithstanding; but that *this* "superadded security" shall not be so construed as to exempt the said corporation, or the lands, tenements, goods and chattels, of the same, from being held liable for, and chargeable with said excess.

And by another clause it is enacted, that the *persons and property of the stockholders* shall be pledged and held bound in proportion to the amount of shares and the value thereof, that each individual or company may hold in said bank, for the *ultimate* redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt; and no stockholder shall be released from such liability by sale of his stock, until he shall have caused to have been given sixty days' notice thereof, in some public gazette of this State. And in case of a failure of said bank, all the stockholders who may have sold their stock at any time within six months prior to said failure, shall be liable in the same manner as if they had not sold their stock. *Prince*, 125, 127.

This then, is the contract made by this corporation with the public, and these are some of the obligations and responsibilities which the *corporators* assumed; the defendant, in common with all the other stockholders, by his acceptance of the

charter, agreeing to all its terms, and to that individual liability clause amongst the rest, for the *ultimate redemption* of the bills of the bank. Every stockholder understood that he took upon himself this risk and burden, and pledged his person and property for the fulfilment of this duty. And on the other hand, every bill-holder, it must be presumed, took the notes of the bank upon the faith of that security for the performance of the undertaking. The contract was inchoate, but the liability commenced when the bills were first put into circulation. It was consummated when the corporation finally failed to redeem them. When the bills of the corporation were issued and received, the holder acquired a right against the stockholder, of which, although *ultimate*, nothing could deprive him. It was absolute, vested, and fixed, notwithstanding its enforcement was deferred or postponed until the happening of a future contingency.

Let us turn now to the testimony of Abram B. Ragan, to see whether the Courts should be astute to protect the stockholders of this company from liability; or whether they should not be liberal in providing the bill-holders with the means of preventing their escape, in the application of those remedies so wisely guaranteed by the Legislature.

Mr. Ragan was cashier of the Planters' and Mechanics' Bank of Columbus, at its first organization, late in the preceding winter, or early in the spring of the year 1837, and continued in office till the spring of 1838. He testifies, that when the bank was organized all its stock was subscribed for, and that 25 per cent. thereon was paid; that a large portion of said payment was made in the specie certificates of deposit, given by the bank of Columbus and the Insurance Bank of Columbus; that a committee of stockholders made arrangements with those banks to give specie certificates for the notes and bills of the stockholders in the Planters' and Mechanics' Bank; that said bank did no business in 1837; and after its organization resolved to do none until the fall of that year, and a resolution was passed to discount the notes of its stockholders to the amount of their stock, less about 2 per cent. for contingent expenses, respect-

ively, making said notes due 1st October, 1837; and that if said stockholders did not borrow upon these terms, others might, and this arrangement was carried out mainly, if not entirely to stockholders; that the first bills issued by said bank, were dated 6th February, 1838, and commenced to be put into circulation a week or ten days thereafter; and then banking business commenced. When this banking business was determined on and commenced, the stockholders and others who had given notes, as before testified to, were required to pay in 50 per cent. thereon, which payment was made in bank bills of suspended banks, and not in specie. At the time bills were first issued by said bank, it had but little specie on hand or in its vault; not exceeding \$800 or \$1000. Said bank made three issues of bills in 1838, the first of \$50,000, the second of \$150,000, and the third of \$80 or 100,000. It commenced business as a suspended bank, and paid no specie whilst witness was connected with it as cashier, except small amounts for change.

These are the startling facts disclosed by the officer who best understood the condition of this institution, and who testifies to what he knows. And yet, when these stockholders who thus abstracted from the vaults of the bank, its specie funds, which they subsequently returned "*in bills of suspended banks*," are called on to make good their collateral promise and undertaking under the charter, for the *ultimate* redemption of a portion of the \$300,000 of redeemable paper currency so illegally and unwarrantably cast upon the community, the attempt is made to browbeat and over-awe not only the parties, but even the Courts of the country, for meting out to the bill-holders, the simple measure of redress so providently provided by legislative forecast; and the most impassioned declamation is resorted to, to expose the "*anomaly*" of such a procedure. To our minds, it would be a much greater "*anomaly*" to suffer a corporation to contract liabilities contrary to its charter, and which it was either unable or unwilling to discharge, and which are adjudged sufficient to work a forfeiture of its charter, and then for the corporation to be relieved from their *personal* liability, by thus taking advantage of their own wrong.

The very idea is abhorrent to every principle of justice. And the Legislature wisely intended, no doubt, to remove from the corporators this strong temptation, to make a way of escape from the consequences of their own defalcation, by surrendering their charter, or doing, or omitting to do those things, which would incur a forfeiture.

And why should it be thought a strange thing for the corporation itself, which is *primarily* liable, to be exonerated under the operation of the Common Law rule, to which we have adverted, and for the *personal* liability of the stockholder, which is *secondary* only, to be retained and enforced? It would not be pretended that a debt due by the bank, and upon which there was an *indorser*, could not be enforced against the latter, notwithstanding the discharge of the principal. Nor is this any new principle, either in legislation or jurisprudence. It has occurred a thousand times and oftener, no doubt, under the bankrupt Acts of England and of this country, that the principal debtor has been released by law, while the debt has been enforced against other parties to the paper, who were in no way interested in its consideration, which cannot be said, by the by, of these corporators. They are no *accommodation* parties merely, but joint and several stockholders, interested in the circulation of the bank, together with all its other operations, upon which a profit or loss might accrue. They would have participated in the *profits* had any been made; where is the hardship then, of compelling them to share the *loss*? For myself, I can see none. We are content, therefore, after the most mature reflection, to re-affirm merely on this point, the views which we expressed when it was first presented for our consideration, in *Lane vs. Morris*. That "in the opinion of this Court, the right of the bill-holder under the 11th section of the charter, to hold the person and property of the stockholders pledged and bound for the ultimate redemption of the bills and notes of the bank, in proportion to the amount of his shares and the value thereof—a right which is not *primary and total*, but *secondary and partial*—is one which he may assert in his own name, *before and after the final dissolution of the corporation*; one which is *wholly* ~~above~~

and beyond the reach of any legislation, and independent, and irrespective of it;" that it "is a supplemental or superadded security, for the benefit of the bill-holder, one which he is authorized to enforce in his own name in an action of debt at Law, directly against the stockholder." 8 Ga. R. 468.

2d. But it is contended that the plaintiff's right, if he ever had any, is barred by the Statute of Limitations, of either four or six years. It is sufficient to state, that in point of fact, it is barred by neither, according to this record. The return of *nulla bona* on the execution against the assignee of the bank, was made the 17th of March, 1848, and this action was brought the 19th of January, 1849, within less than one year from the time when the liability accrued. And strange as it may seem, a similar state of facts existed in the case of *Lane vs. Morris*, decided at this place twelve months ago. There judgment was confessed in 1848, a return of *nulla bona* made on the *fi. fa.* in March of the same year, and the suit was brought to May Term, 1851, of the Superior Court of Muscogee County, viz: within about three years of the time when the right accrued. Indeed, 'if the *equitable* assets of the bank are to be first exhausted, before the eventual personal liability of the stockholder can happen, as is insisted upon by the plaintiff in error, the Statute has not yet commenced running.

The plea of the Statute of Limitations, as applicable to this class of claims, was first made in *Lane vs. Morris*, to which I have already referred. It appeared from the record, that this defence, among others, had been filed in the Court below; and it was argued before this Court, and an opinion pretty strongly expressed against the Statute. When I came to write out the opinion, however, I was convinced, by a careful examination of the bill of exceptions and transcript, that the question was not legitimately made—for the reason, that although the fact had been assumed in the argument, that still it did not appear from the record that the point had been decided by the Circuit Court. In truth, I apprehend that it was, and in favor of the plaintiff in error; and hence it was not excepted to and brought up. The Court therefore threw out the intimation merely, that "it ap-

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peared to have been long since settled in the English Courts, that the limitation of six years did not extend to the case of an action of debt founded upon a statutory liability—the Statute being considered in the nature of a specialty; and that, in *Bullard vs. Bell*, (1 *Mum.* 243,) Judge *Story* reviewed the authorities upon this subject, and decided, that the short bar of six years did not extend to an action of debt against the stockholders of a corporation, founded upon a statutory liability.”

In the same case, the question was regularly presented twelve months thereafter, and the *intimation* previously thrown out was fully adopted, namely, that in an action brought by a bill-holder against a stockholder, under the 11th section of the charter incorporating the Planters' and Mechanics' Bank of Columbus, for the ultimate redemption of the bills issued by the bank, the liability will be considered in the nature of a specialty, and *not* barred until twenty years have elapsed. 10 *Ga. Rep.* 162.

To this *judgment* we still *adhere*, with unshaken confidence in its soundness.

The Bank of the United States vs. Dallam and others, (4 *Dana*, 574,) decided by the Court of Appeals of Kentucky, was not relied on in the discussion in the case in 10 *Ga. Rep.* nor was it before the Judge who delivered the opinion in that case. It is very similar in many respects, to the case now under consideration, as well as to that of *Lane and Morris*; and we are gratified to find the coincidence in the conclusion of that Court and ourselves, as well as in the train of reasoning by which they were guided, and the authorities upon which they relied to sustain their opinion. It is a consolation and encouragement in questions of such magnitude, to be thus sustained and fortified.

The Bank of the United States having in November, 1820, obtained a judgment for seven thousand dollars, with legal interest from February, 1820, against a private corporation, styled the “Fayette Paper Manufacturing Company,” and having had a *feri facias* issued thereon, on which there was, early in 1821, a return of *nulla bona*, filed a bill in Chancery against the stockholders of the company, in 1830, for subjecting their individu-

al property in proportion to the respective amounts of their several interests, in virtue of a provision in the charter of incorporation, in the following words: "Provided, however, that the estate and property of any individual shareholder, who holds or possesses stock in said corporation, shall at all times be liable and subject in law, in proportion to his or her interest therein, to pay and satisfy all debts and demands contracted by said corporation, during the time he or they held stock therein, upon the failure of the incorporate funds to discharge the same." The several defendants having in their answers relied on the Statute of Limitations, the Circuit Judge, on that ground, dismissed the bill absolutely, and the bank appealed and insisted on a reversal of that decree.

Chief Justice *Robertson*, who delivered the opinion of the Court, says:

"As the judgment and return on the execution thereon, entitled the bank to demand the amount of its debt from the stockholders in their personal right; and as they are liable, not *in solido*, but only distributively, in the ratio of their several interests, and are moreover multitudinous, we have no doubt that the Circuit Court sitting in Equity, had jurisdiction over a joint bill as filed against all of them, concurrently, with the cognizance of a Court of Law over separate actions against each of them upon his sole and several liability."

The Chief Justice then proceeds to show that any limitation that would bar the action at law, would bar the bill; and that the provision in the charter subjecting the property of the stockholders, does not render their property liable to the levy of an execution on a judgment or decree against the corporation, nor subject them to any suit as parties directly bound by any contract of the corporation; but that the liability of the shareholders is founded upon the contract made by the corporation, the return of *nulla bona* showing the failure of the corporation to discharge it, and the *Act of Incorporation*, all of which constituted a *statutory liability* which might be properly enforced at Law by an action of debt, and thus continues—

"Counsel for the shareholders, assuming that their liability is

collateral, and results only from an implied promise, insists that *assumpsit* would have been the appropriate remedy. But we can neither admit this assumption, nor acknowledge the conclusiveness of the deduction thus drawn from it.

"The Statute of Limitations of this State, like that of James the First, of England, provides among other things, that all actions of debt grounded upon any *lending without contract* or *specialty*, shall be brought within five years after the cause of such action or suit, and not after. In England as well as in this country, it has been frequently decided, that the foregoing *provision* respecting the action of debt, applies only to such actions on *parol* contracts; and also that it applies to such contracts only as are contracts *in fact*, and not to such obligations *quasi ex contractu*, as are imposed either expressly or constructively by *mere law*."

And in support of the foregoing positions, the following cases are cited: *Jones vs. Pope*, 1 *Saunders*, 367, '8, and notes; *Hodsdon vs. Harridge*, 2 *Ib.* 64, '5, and notes, and cases there cited; *Peese vs. Howard*, 14 *Johns. Rep.* 479; and *Bullard vs. Bell*, 1 *Mason*, 243.

[4.] It is contended that this case is entitled to no weight as *authority*, for the reason that the question which it purports to adjudicate, was not legitimately presented for the determination of the Court. The same criticism is made on the remark of Judge Story, in *Wood et al. vs. Dunner et al.* 3 *Mason*, 308; viz: that the capital stock of an incorporated bank is deemed a trust fund for the payment of debts, &c. Indeed I may add that the opinion in almost every case which has been relied on in support of these bank decisions, has been disposed of in the same summary manner.

What *adjudications*, I ask, are *authority* in this State? None, I answer emphatically, except the decisions of our own Courts; of the Supreme Court of the United States, upon subjects on which they are made by the Constitution the exclusive or final arbiter, and those of the English Courts previous to our adopting Statute. All else is *mere opinion*, and comes recommended in reference alone to the source from which it emanates. With this limitation, the inquirer after judicial truth is at liberty to

range through the whole field of legal learning ; to explore the decisions of the American Courts—British and other foreign tribunals—the opinions of majority or minority Judges—of distinguished jurists, on or off the Bench—on points made or not made by the pleadings, text-books, elementary treatises, law lectures, and every other department of judicial science ; gathering resources from all ; examining the whole without fear ; retaining what is applicable to truth and justice, and rejecting what is not.

When a decision has been pronounced in England or the Courts of this country, upon solemn argument upon the exact point in issue, it is deserving of course of more respect. The presumption is in favor of its correctness ; and we adopt it frequently and the more readily as a just exposition of the law. Still, I repeat, it is not *authority* ; and it is a total misconception of the matter to claim for it the sanctity of law, and to maintain that the Courts are bound to follow it as such. It is *mere opinion*, and nothing more.

In cases which are *authority*, we must look alone to the *principle* of the decision ; for that alone is *law*. And any expression of opinion by the Judge in such cases is *obiter dictum* only. But where the whole is but opinion and nothing more, it is not improper to look to the argument of the Bench or the individual member of the Court, who is its organ in delivering its opinions.

In *Slack vs. Moss, Dudley*, 161, the Convention of Judges, in determining between the conflicting rules in *Walton and Shelly* and *Jordan and Lashbrooke*, followed the dissenting opinion of Judge Cheves, in *Craig vs. Newton*, in preference to that of a majority of the constitutional Court of South Carolina. They adopted the opinion of *Lord Kenyon* instead of that of *Lord Mansfield*, because the latter decided in reference to the commercial policy of England, to the injury of every other interest. They rejected the lead of New York, Pennsylvania and Massachusetts, because as they supposed, the Judges of those States, taken as they generally were, from the large commercial cities of those States respectively, adhered to the rule in *Walton* and

Shelly, for the same reason that it subverted the local interests of New York, Philadelphia and Boston.

In other words, the Convention denied as *authority*, the decisions of the State Courts as well as the British Courts, since the revolution, because their reasons were not sound and applicable to the state of things here ; but “encouraged a spirit of favoritism at war with the genius of our Constitution, and adverse to the tranquillity of our government.”

Equally untrammelled is this and every other independent Court in this country. Apart from *authority*, we look to *principle* alone, as the beacon-light to guide our investigations.

We here dismiss this ground, with the single remark, that we are clear that a *statutory liability* is not included within any of the Acts of Limitation of this State. It is neither a simple contract; nor a *specialty* for nothing is but a writing under seal ; but a *quasi* contract in the nature of a specialty. But being at least as high evidence of indebtedness as any specialty can be, that twenty years is the proper bar to actions brought to enforce the obligation it imposes. Notwithstanding some fifty pages of Mr. Holt’s brief are devoted to the discussion of this branch of the case, it signally fails in controverting this impregnable position. It is the capital defect in this voluminous argument.

Even if this statutory liability was a specialty, and consequently embraced in the Statutes of 1767 and 1805, *as it is not*, still we should hold that the limitation of *four years*, provided by the latter Act, did not apply to this case. By the Act of 1767, *specialties* are excepted from the *four years* limitation therein imposed ; or rather the four years bar is expressly restricted to *contracts without specialty* ; by the Act of 1805, the four years limitation is extended to *all contracts*. But by the Act of the 8th of December, 1806, the law of 1767, is fully revived ; and all Acts and parts of Acts which militate against its intent and meaning are repealed. When the Statute of 1767, had restricted the limitation of four years to contracts *without specialty*, and the Act of 1805 extended it to contracts *with specialty*, may it not be fairly insisted that this latter provision is contrary to the true *intent* of the former, and therefore repealed by its revival ?

But I repeat that we do not rest the decision upon this view of the subject.

3d. The next position occupied by the plaintiff in error, is that not being an original subscriber for the stock upon which he is sought to be made chargeable, but holding by transfer from others who failed to give the sixty days notice of the sale in terms of the charter; and the same, moreover, having been made within six months before the failure of the bank, the liability, if there be any, is upon the original stockholders, and not upon him; that the assignment itself is void as to the creditor. Besides, he insists that if liable at all, it is not to the extent claimed by the plaintiff in his action, inasmuch as that would make the capital stock of the bank *four*, instead of *one* million of dollars, as limited by the charter.

One of the counsel for the plaintiff in error, cites numerous precedents from the different States of the Union, to show that upon charter clauses similar to the one under consideration, it has never been held that *all* who ever were stockholders are liable. That I may do justice to this portion of the argument, I will transcribe the whole of it.

“We grant that the cases to which we have referred, look a different way, *every way*, except as we have said, to the liability of all. We believe that if the Courts making those decisions, had entertained the just and holy horror which we have endeavored to express, and which this Court has on a former occasion so well expressed, of judicial legislation, they would not have made these decisions.

“Courts are too prone to feel that they are called upon—that they are obliged, to help out the errors of legislation. This confessedly is not their duty, nor is it their privilege.

“We believe that it was this conviction, well fastened upon the mind of the Court, that it could not, that it did not possess the administrative power so extensive as to single out a particular class and declare them liable, that led it, may we in the most perfect respect say, hastily to the conclusion, that all were liable. If it was haste, it was *constitutional haste*, the misfortune, the great misfortune of this tribunal, and in nothing its fault.

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We of course allude to that particular provision of the Constitution, which compels, with a tyrant's will, the decision of every cause brought to a term and during the term, be the causes many or few, and the term short or long. We have seen the mass of confusion and contradiction multiplied into itself, which has grown out of the efforts of the Courts to help out the omissions of the Legislature. Here we have seen that one class was decided liable, and there another; and yet under the very same law or laws, having in view the same ends. The charter of the Rossie Lead Mining Company, upon the construction of which, in this particular connexion, we have referred to a number of cases, had its origin in 1837. In 1846, we find in the Court of Errors of New York, senators gravely discussing *who were liable*, and continuously from the date of the charter this has been so; the Courts agreeing upon nothing, save that which we seek to establish—that all are not, and cannot be liable. This very confusion and contradiction—this very inability of the judicial mind to centre upon any particular class, is in itself a most potent and unanswerable argument in favor of our position: that it is a matter which could alone have been settled by the law-making power; and this having omitted it, the law-administering power cannot cure the omission.

“We have done with this question. Have we shown that there is no precedent for the liability of all, and that the Legislature having failed to designate a class, the Court is powerless to supply the omission? This is what we have intended; our success is not for our judgment.”—*Mr. Holt's Brief, page 96.*

Ex concessio, then, every Court that ever decided this vexed question, has ruled it wrong, “ourselves included.” All the rest, in fixing the liability upon *any* particular class of stockholders; we, for holding that *all* are responsible. With this difference however, (thanks to our brother for this plea in mitigation in our behalf) that other Courts had ample time “to see the right and pursue it too,” while we have been betrayed into error by the “constitutional haste” with which we are compelled to render our judgments.

After *nine years*! consideration, it seems that the New York

tribunals have been unable to agree upon the proper construction to be put upon a similar clause in the charter of the Rossie Lead Mining Company. It may be expected that their solution of this knotty point, *should they ever arrive at one*, will at least be satisfactory.

We shall endeavor to avoid the imputation of adding to "the mass of confusion and contradiction multiplied into itself" which has grown out of conflicting decisions, by being at any rate consistent with ourselves; and maintaining, as we have heretofore done, that inasmuch as the charter declares, that "*the stockholders shall be bound*" for the ultimate redemption of the bills of the bank, that it is our duty, first to ascertain who answers the description, and then against such to enforce the obligation imposed by the Act.

Another distinguished counsel for the plaintiff in error, whose candor never forsakes him, be the consequences what they may to his client or his cause, admits, as all fair minds are forced to do, *that somebody is liable* for the ultimate redemption of the circulation of this bank; and he inclines to the opinion, that it is those who were stockholders at the time the liability accrued. And in his argument before the Court he was understood to say, those who were stockholders when the bills were issued, and who, notwithstanding the transfer of their stock, had failed to get released upon the conditions prescribed by the Act.

In business corporations, as mining and manufacturing companies, this rule has frequently been adopted, and may be just and right. In banking institutions, it is wholly impracticable. The date of a contract fixes, ordinarily, the time of its execution, and consequently, the period when the liability of the parties to it attaches. Not so with bank bills. The date of a bank note is no criterion whatever, of the time when it originally issued, much less of its last or final issue; for the bills of a bank are returned and re-issued daily, in the ordinary course of business.

Besides, this construction would often result like the other, in discharging all the stockholders. For example, suppose that those who were stockholders in 1838, when the first \$300,000

were issued by this bank, had all transferred their stock more than six months previous to the failure of the bank, and had given the sixty days' notice thereof in terms of the charter. They would be exempt, of course, by the law of their contract. Neither could their assignors be made responsible, for they were not stockholders when the notes were issued. In such case, upon this hypothesis, none would be liable. But here, again, we encounter the stern mandate of the Statute, that "*the stockholders shall be liable* for the ultimate redemption of the bills of the bank."

We have been furnished with numerous rules of construction, by which it is insisted, the true exposition of this 11th section must be guided. And amongst the rest, it is said, that the term *stockholder*, must receive the same interpretation wherever it occurs in the charter. By the 4th section of the charter, it is provided, that the *directors* shall be chosen by the *stockholders*, on the first day of February of each year. And it is asked, will it be pretended that those who have transferred their stock, but failed to give the sixty days' notice, would nevertheless be deemed *stockholders*, in contemplation of this 4th section; and as such, be allowed to vote for directors? Most certainly not. And we now retort the inquiry, and with an application which it is difficult to escape; are not they *stockholders*, and as such, entitled to vote, to whom the transfer is made, with or *without* notice?

If the argument, therefore, is good for anything, it will fix conclusively the ultimate liability, under the 11th section, upon the *assignees* of the stock, whether the *assignors* have complied with the Statute in making the transfer, or not.

But candor compels us to say, that in our judgment, the fallacy of the proposition consists in the assumption, that the same meaning is to be attached to the term *stockholder*, wherever it occurs in the Act. The true distinction is this, the unlocking of which, has created much confusion in this argument. The same individuals may be stockholders outside, but not inside, the corporation. As it regards *third persons* and the liability clause in the 11th section, all are stockholders, *pro hac vice*, who ever

were such, and who have failed to get released in the manner prescribed by the charter. But as between one another, those only are stockholders who actually for the time being, own the stock, by subscription or purchase. One idea alone, will demonstrate the truth of this proposition. A sale of stock within six months of the failure of the bank, *with notice*, does not discharge the seller from the liability clause in the 11th section, as a *stockholder*. And yet, will it be pretended that the seller is a *stockholder*, and would be so treated and considered by his co-corporators, so far as the rights and privileges of the members of the corporation are concerned?

Counsel have fallen into another error, equally palpable. Mr. Colquitt argues, that the ultimate liability of the stockholder, could only be enforced during the continuance of the charter, on the ground that it is a solecism in language, to speak of a *stockholder* in a corporation which is dissolved. And yet, in New York, where the individual liability does not accrue until after dissolution, the same phraseology is everywhere used by the Courts, in their opinions upon these cases. Take as an illustration, the first head-note in the *Bank of Poughkeepsie vs. Ibbotson*, (24 *Wendell*, 473,) "An action at law lies against an individual *stockholder* of a corporation for debts owing by the company at the time of its dissolution, &c." See also, *Slee vs. Bloom*, and *Perryman vs. Briggs*, 1 *Hopk. R.* 300, 8 *Conn.* 387. *S. C. in error*. And this is the expression almost universally employed in the charters of moneyed and other corporations, which contain an individual liability clause. *Angell & Ames on Corporations*, 552, 553.

We must say, with sincere respect for the eminent counsel who pressed this position with so much warmth, that it is in our judgment, more a play upon words, than anything else. The Legislature intended by the use of the term *stockholder*, to indicate the persons composing the company, upon whom this individual responsibility should attach, whether before or after the dissolution of the charter. "The *stockholders*," say the authors just cited, in every bank, *at the expiration of its charter*, are chargeable in Massachusetts in their individual capacities, for the pay-

ment of all bills of the bank remaining unpaid, in proportion to their stock." *Ibid*, 552. We must say, moreover, that we are far from yielding to the reasoning in this case, which would exempt the stockholders unless prosecuted during the existence of the charter. The 16th section looks decidedly the other way. In many of the States, the fact of *dissolution* is made the contingency upon which the individual responsibility attaches ; and there is good sense in this view of the subject.

We settle down, therefore, not only with undiminished, but increased conviction in the truthfulness and rectitude of our former opinion, namely : that inasmuch as the charter does not restrict the liability, as is usually done, to any particular class of stockholders, either those who originally subscribed, those who were stockholders when the bills or notes were issued, or those who were so at the time of dissolution or when the liability is sought to be enforced ; making provision, however, for all to escape liability who have transferred their stock and given sixty days' notice thereof, in some public gazette of this State, provided the sale has not taken place within six months prior to the failure of the bank ; and declares most explicitly that no stockholder shall be relieved from his liability, notwithstanding any disposition he may have made of his stock, until this is done ; that all who ever were stockholders are liable to bill-holders, unless they have been discharged in the manner prescribed by the Act.

Such is the plain, express and unmistakable language and meaning of the Statute. And so ample was the security which the Legislature intended to provide, that even sale with notice is no protection, if within six months of the failure of the bank. Each and all are subject to be sued at the instance of any and every bill-holder, in a separate action at Law, or on a joint bill in Chancery against all of them ; the jurisdiction of the two powers being concurrent as to the remedy. There can be but one satisfaction except for costs, and the stockholder can be charged only to the extent of his stock. Beyond this, he may defend himself ; and on payment of this amount, there is an end of any further liability. *Lane vs. Morris*, 8 Ga. R. 486.

But it is suggested that there is an insurmountable obstacle to the practical operation of this construction. It may be stated thus: It is conceded that the same stock cannot be made twice liable. Suppose it has been conveyed and re-conveyed in different parcels, and through sundry persons, all of whom are responsible. The stock itself having no ear-marks, or other means of identification, how can it be determined whether it has, or has not, been before made chargeable in the hands of some other person?

Grant that the difficulty really exists, and that it is insuperable, the fault would then truly lie at the door of "the law-making, and not the law-administering power." And there we should be content to leave it. But fortunately, we are in no such strait. The perplexity can be obviated upon the principle of *proportion*, if not of *identification*. For instance, A owns 100 shares, and sells to B, who owns 100 more by subscription, making together, 200. B sells 50 shares to C. A recovery has already been had against A to the extent of his liability, and C is now sued on his 50 shares. Now it is unquestionably true, that it cannot be ascertained whether all, or what proportion of C's 50 shares once belonged to A. But it is known that one-half of B's 200 shares were obtained from A, one-fourth of which 200, he has transferred to C. The whole of B's shares being liable to 50 per cent, the 50 bought of him by C, is liable to the same per centage. Again, C sells 10 shares to D, who holds 10 more in his own right, which have never paid any thing. D's 20, provided C had not been sued, would be liable to 75 per cent. and so on, *ad infinitum*.

As to the equities *inter se* of these stockholders, it is premature to agitate that subject. All may be equally liable to the bill-holders to discharge this common burthen, and yet be entitled to remuneration as against one another. We do not say that this is so.

The objection to the rule, that it practically multiplies the stock from one to four million of dollars, or some other large and indefinite sum, is founded in a total misapprehension of its operation. It may quadruple the number of *stockholders*, so far as

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liability under the charter is concerned; but not the *stock*. It remains the same. The Legislature designed to make four persons instead of one, co-sureties or joint and several guarantors, for the ultimate redemption of the bills; that is, provided the remaining three failed to comply with the means of escape provided by the charter.

And is there any thing unreasonable in this? A land title passes through a dozen hands, each conveying with warranty. Upon eviction, the last vendee may sue any one or all of the previous vendors. And no one doubts either the Law or Equity of this procedure. Every grantor could have protected himself by selling with a quit claim deed only, but neglecting or refusing to do this, he is made liable. So of indorsers who fail to restrict their liability. Are they not all bound to the holder of the note? Why should not the assignors of bank stock be put upon the same footing, and subjected to the same regulations and restrictions?

Another position occupied in behalf of the defendant below is, that if the stockholders are liable at all, as *one* of all, or *one* of a *class*, that they are liable for \$25 per share only; and this to be proportioned to \$250,000, the amount alleged to have been actually paid in on the stock; and not for \$100 per share, to be proportioned to \$1,000,000.

In *Hightower vs. Thornton*, (8 Ga. R. 486,) and in *Lane vs. Morris*, (10 Ga. R. 162,) this Court held, and upon an extensive examination of the authorities, the opinion is fully sustained, that the sum specified in the charter, and not the amount paid in on the shares, constituted the capital stock of the corporation; that this was expressly declared to be so by the Act itself, which likewise fixed the value of the shares at one hundred dollars each. It being our opinion then, as now, that the same rule of interpretation was in the mind of the Legislature in forming the *second* and *eleventh* sections of the charter. *Prince*, 125, 127. We forbear to enlarge upon this topic.

4th. But it is said that the plaintiff below was not entitled to his action at the time he brought suit, because the liability of the stockholder to the bill-holder was *ultimate*, and could not be

resorted to until all the assets of the bank and the unpaid capital stock, being seventy-five dollars per share, were called in and exhausted, which the facts proven in this case showed had not been done.

We feel the importance of the question here presented, and that it deserves grave consideration.

In the first place it is assumed, that this point is *res adjudicata*; and *Lane vs. Morris*, (10 Ga. R. 162,) is referred to by counsel in support of the assumption. That, it will be remembered, was an action by the bill-holder against the stockholder. Three questions were made for the decision of this Court. *First*, the Statute of Limitations; *second*, the time from which the plaintiff was entitled to interest on the amount of bills sued for; and *lastly*, the value at which the stock was to be estimated per share, viz: whether in fixing the amount of the defendant's liability under the 11th section of the Act, the valuation of the stock was to be reckoned at one hundred dollars, the charter price; or twenty-five dollars, the amount proven to have been actually paid in.

Upon the *second* point, the Court below instructed the Jury, that the plaintiff was entitled to receive interest on the amount of bills held by him, from the time of the return of *nulla bona* upon the *fi. fa.* against the bank. Upon this ground, this Court reversed the judgment of the Circuit Judge, and ruled that the stockholder was only liable to pay interest on the bills for which he was sued, from the time of the demand of payment thereof, by the bill-holder.

Could that judgment be justified, if not only all the assets of the bank, legal and equitable, but even the unpaid capital stock had to be first called in and exhausted, before the *ultimate liability* of the stockholder attached at all? On the contrary, if this latter proposition be true, that suit, as well as this, was prematurely brought; and instead of allowing interest to be recovered from the time of its commencement, that being the only evidence of demand, we should have remanded the cause, with instructions to have it dismissed.

Lane and Morris then, is a decision directly upon the ques-

tion; and unless we are prepared to review and reverse it, is conclusive *against*, instead of *for* the plaintiff in error. And the defendant in error is entitled "to repose upon it with perfect security." For, was as justly remarked by Mr. Hill, "the consideration and discussion of this question was necessary and preliminary to the point then decided and in issue."

The inquiry then is, under the 11th section of this bank charter, pledging the person and property of the stockholder for the *ultimate redemption* of the bills and notes of the company, does the right of the bill-holder to sue accrue upon the exhaustion of his *legal* remedies against the corporation and its property, or is the obligation imposed upon him to pursue, collect and apply the *equitable* assets also, including the unpaid capital stock?

In other words, what was the *contingency* in the mind of the Legislature, upon the happening of which, *primary* liability was to be considered as exhausted, and the *secondary* to comlience?

It is argued in behalf of the plaintiff in error, that this *ultimate* liability against the stockholders is attempted to be asserted while the assets of the corporation, the fund primarily liable, is accessible and amply sufficient to discharge the demand.

That there is no analogy in the law, as applicable to a corporation and a natural person, or to the evidence of insolvency; that in case of natural persons, their property is usually tangible and visible; but that this is not only not true, as it respects corporations, inasmuch as that kind of property is not within the scope of their business, but often, as in the present case, they are expressly forbidden from owning lands, except for special purposes, and to an extent merely nominal.

A return of *nulla bona* against a bank, therefore, is paramount only to a demand and refusal, but nothing more; and does not establish, even presumptively, the *insolvency* of the corporation; that in order to maintain a suit against a natural person liable only in the second instance, a return of *nulla bona* as to his *equitable* estate would prove nothing as to the exhaustion of his real and personal property, and yet, that such would be more conclusive of the insolvency of the principal, than would be the return of *nulla bona* in the case before us.

That if demand and refusal to pay, on the part of the principal, is not sufficient to charge a natural person *secondarily liable*, and ultimate liability does not commence until the exhaustion of the estate of the principal, by judicial process, then nothing less than proceedings in Chancery would satisfy the demands of justice and of the Statute in this case.

That this personal liability clause is of modern date in bank charters. Formerly it was thought that the public was amply protected without it. There was not only the bills of exchange, promissory notes, &c. secured by the bank, dollar for dollar (at least) for its notes issued, the one bearing interest, the other not; but also the amount of capital stock paid in, as well as the balance remaining due, which constitutes a fund for the redemption of the bills; yet all of these primary bonds, Mr. Hill charges the creditors with having passed by, (like the Priest and the Levite in the parable,) and have gone over on the other side.

And to sustain the foregoing positions, *Crease and others against Babcock and others*, (10 *Metcalf*, 525,) and *Green against Breed and others*, (*Ibid*, 569,) are relied on.

Counsel for the defendant in error insists, on the other hand, that it is the *failure* of the bank which constitutes the event upon which the liability of the stockholder may be enforced; and that the Legislature has used the term *failure*, as synonymous with *insolvency*, as appears by reference to the 16th section of the charter, which is to be considered as part and parcel of the 11th section, under which this suit is brought; and as it appears also by the whole body of legislation in this State, on the same subject matter. And that it is immaterial whether the stockholders are considered as principal debtors with the corporation, from the moment when they became stockholders and bills were issued, the right to enforce their liability being postponed; or whether they became liable when the corporation refused to redeem, with a like postponement until judgment of forfeiture and the ascertainment of *insolvency* by sufficient legal process; or whether no liability whatever attached until *insolvency* was declared by judicial proceedings. Upon any hypothesis, it was *insolvency*, upon which the enforcement of the liability

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rests; that is to say, the legal exhaustion of a primary liability, capable of being ascertained by legal proof. And that this supposition only, is consistent with the simple, easy and prompt remedy, furnished by the charter, for the enforcement of the ultimate liability imposed upon the stockholders.

The pleadings in this case show, and the averments in the declaration are supported by the testimony, that there has been a judgment of forfeiture against the bank—the appointment of a receiver—a judgment at Law against the receiver, for the recovery of this demand—which is tantamount to a judgment against the bank—a *fi. fa.* and a return of *nulla bona* thereon. The *insolvency* of the bank is thus established. It has no legal assets. This is shown by the return. The plaintiff in error traversed, by a part of his plea, the return; issue was joined, and the Jury returned a verdict for the defendant in error. To the rest of the plea, which alleged choses in action in the hands of the receiver and not subject to garnishment, equitable assets, and uncalled subscription for stock in the hands of the stockholders, the defendant in error demurred. Admitting then, the truth of the return, and that there is nothing on which a levy can be made, shall the creditor be now compelled to go into Equity, search out and collect any equitable interest which the defunct corporation may have had or claimed?

The Legislature, in enacting this law, in which an ultimate liability is imposed, upon the exhaustion of a prior liability, are to be understood as meaning legal liability. They legislate with reference to Law, not Equity. Legislative enactments are to be construed with reference to law, and legal rights and remedies.

All the analogies of the law are against the construction contended for by the opposite side. The assignee of a bond may sue the assignor upon his guaranty, after judgment *fi. fa.* and return of *nulla bona* thereon against obligor. The sureties' liability on a guardian or administration bond, is *ultimate*; still it is only necessary to obtain a judgment against the principal, cause a *fi. fa.* to issue, and procure a return of *nulla bona* thereon. The Act contemplated a very simple and suitable remedy.

It never intended to force the small bill-holder to prosecute the corporation to the exhaustion of all its assets. The idea is extravagant and preposterous. The expense and delay would amount to a denial of justice. The Legislature, moreover, designed providing some additional security to the bill-holder. The right to go into Equity and subject the equitable assets, existed independently of the Statute. How inconsistent such an idea is, too, with the simple action of *debt* provided by the charter.

The only direct authority cited upon the defendant's side of the question, is one which we have had occasion to refer to heretofore for another purpose, to wit: *The Bank of the United States vs. Dallam and others*, 4 Dana, 574.

I have thus given a pretty full synopsis of the main grounds occupied in the discussion.

Much more importance has been given to the Massachusetts cases in *Metcalf*, than they are entitled to. It is true, that in *Crease* against *Babcock*, Chief Justice *Shaw*, in considering the question whether the holders of bills could have a *decree* for payment by the stockholder, before the assets of the bank had first been applied, uses this strong language: "shall the individual stockholders be charged when the bank is ready and willing to pay? This would be unreasonable. Shall they be charged when there are assets in the hands of the officers of the law, which assets are the first and natural fund applicable to the payment of such notes, and when, for aught that appears, such assets constitute a fund sufficient for their payment? May not the terms "shall remain unpaid" be fairly construed to mean, *ultimately unpaid*, after application of the proper funds?"

And in the next case, of *Green vs. Breed and others*, the Court held, that when the assets of the bank are placed in the hands of receivers, the holders of its bills who do not present their claims to the receivers, cannot recover of the stockholders the full amount thereof, but only the balance which they would have been entitled to recover if they had proved the claims before the receiver, and obtained part payment.

It will be remarked, however, that these were proceedings in

Equity, at the instance of all the bill-holders, or a part of them, for themselves and all others standing upon a similar footing, and having similar claims; and filed against all the stockholders, to enforce an ultimate liability clause, similar to that which we are considering. A Master had been appointed to receive and distribute the funds arising from the assets of the corporation. There was money in his hands to be divided among these creditors, and the Court held, and we think very properly, that being dependent upon the aid of a Court of Chancery to enforce their rights, its assistance should not be extended, if they neglected or refused to secure and apply the fund then in the custody of the Court for the payment of their claims. We have, and can have, no controversy with this decision.

Here the bill-holder does not ask the aid of a Court of Equity, to make his statutory remedy available. On the contrary, he deprecates its interference. He is not in a situation, therefore, to be compelled to do what is claimed to be equity. And yet, were it true even in his case, that there was cash in the hands of the assignee, which he might obtain upon application, or which he had refused to take when tendered, it would be questionable whether or not his demand against the stockholders would not be cut down *pro tanto*, upon plea and proof of these facts. This was virtually the Massachusetts case, but this is not the case made upon this record. Here, the *insolvency* of this corporation stands out prominently upon the pleadings. It had, in May, 1843, gone into liquidation and made an assignment of its effects. In the month following, there was a judgment of forfeiture, revoking its franchises, on account of its *failure*.

In the *Kentucky* case, in *Dana*, the Statute of that State imposed a liability on the individual stockholders for the debts of the corporation, upon failure of the corporate funds. Here was a clear case of *ultimate liability*. But the Court held, that a judgment, *fi. fa.* and return of no property in a suit against the corporation, was sufficient to enable the creditor to proceed against the stockholder personally.

In looking through all the cases of *ultimate liability*, under or-

ery form of local legislation, it will be discovered, that this is the evidence invariably relied on to authorize a recovery in the second instance.

Here is an acknowledged right, for the enforcement of which, a plain Common Law remedy is provided. Was it ever known, was it ever heard of before, that a party under such circumstances, was compelled to go into Equity, not to make that Common Law remedy available, but as a preliminary proceeding indispensably necessary to its enjoyment? Such a proposition is, to our mind, utterly inconsistent with the fundamental object which moved the Legislature to afford to bill-holders more effectual security, by furnishing them with this easy, cheap and prompt remedy, under the charter, for the enforcement of the *ultimate liability* imposed upon the stockholders.

Resort is frequently had to Chancery, to obtain its aid to enforce a legal lien. It cautiously interposes always, for this purpose. It requires the applicant first to exhaust all of his legal remedies, before it will interfere. But here the very converse of this doctrine is maintained. And it is contended, that a creditor with a legal demand, and with ample means at his command, at Law to collect it, shall nevertheless desist, until he has first gone through a tedious and expensive proceeding in Chancery, to see whether he cannot discover something *which, by a decree*, may be appropriated to his claim.

Such a construction, in my humble judgment, rests on no foundation; and would render utterly nugatory and destitute of advantageous operation, a provision resulting from the anxious solicitude of the Legislature, to protect the community from the ruinous consequences of a spurious currency, "instead of a shield to creditors, converting it into a sword to pierce them by alluring and then disappointing their confidence."

We look upon this *ultimate liability* clause, as neither more nor less in substance, than an indorsement in the *second instance*, by which the holder of a note is bound to prosecute the maker to a *prima facie* case of legal *insolvency* only, or to assign some satisfactory excuse for not doing so; such as the non-residence, or removal of the party from the State. And I give it unhesi-

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tatingly, as my individual opinion, that an averment in the pleadings in the present case, supported by competent proof, showing the impossibility of obtaining judgment against the corporation, would entitle the bill-holder to proceed at once against the stockholder, without having instituted any previous suit whatever. The law does not require impossibilities ; and the secondary redress in this case was not designed to depend upon a condition precedent, which never could be performed.

It is urged with much earnestness, that no humane or wise Legislature ever could have intended to create a charter, imposing such burdens.

But the Statutes of some of the States are far more stringent than this, imposing a personal responsibility upon the members of a corporation in case of the neglect of a corporate body to pay the demands which it has incurred.

In Massachusetts it is enacted, that wherever any execution shall issue against any manufacturing corporation thereafter created, and such corporation shall not within fourteen days after demand made upon the President, Treasurer or Clerk of such corporation, by the officer holding the execution, show to him sufficient real or personal estate to satisfy and pay the sums due on such execution, the officer shall sue and levy the same upon the *body or bodies* and *real and personal estate* of any member or members of such corporation. *Angell & Ames on Corporations*, 559.

And by this very charter, in case of excess of indebtedness, the Directors under whose administration it shall happen, are made *personally liable* for the same ; and may be sued at once, without compelling the creditor to go first against the corporation, notwithstanding the corporate assets are made liable for, and chargeable with said excess.

We doubt not that the consequences will be disastrous to some stockholders who may not be in actual default. It was the misfortune of the innocent, to be associated with others who were unworthy of their confidence, and who abused their trust ; and who from unskillfulness or other cause, have entailed this ruin. But now that the public is injured, whose duty is it to re-

sort to Equity, to search out and collect up the corporate assets, and force the delinquent parties to discharge their obligations? To preserve unimpaired, the security and benefit intended to be given by the Legislature to the creditor, we think the burden devolves upon the corporator who was entitled to all the gain, had any been made by this company; who had the right to interpose and arrest and control the management which has produced this mischief; we repeat it is for him, and not the bill-holder, to incur the expense and trouble of saving from the wreck, any pittance which may be left. "Better," say one of the Courts, the words of which we have already quoted, "that the corporators should become the victims of their own disasters, in preference to their being fatal to their unfortunate creditors."

[5.] The plaintiff, in his amended declaration, sets out, not as the *ground* of his recovery, but as *inducement* to the action, a judgment against Robert B. Alexander, as assignee of the bank. The defendant, by his 14th plea alleges, that there is no record of any such judgment, and prays judgment of the Court, and who puts himself upon the country. This plea was demurred to, and the demurrer sustained. And this constitutes the fifth exception, which it becomes necessary to notice.

The plea as it stands, is defective in form. The record set out in the declaration being of a *domestic* judgment rendered in a Court of *Record*, to wit: the Superior Court of Muscogee County, the plea should have concluded to the *Court*, only—the trial being by inspection and examination of the record. Where the record is of a *foreign* judgment, or if the Court which rendered the judgment be *not* a Court of *Record*, the plea should conclude, not with a verification of the record to the Court, but with a verification to the country; the issue being directly upon the *fact*, whether any such proceeding took place, and not upon the existence of any judicial memorial of it. *Stephens on Pleading*, 101, (*note l.*) *Dyson vs. Wood*, 3 *Barn. & Cresw.* 449; 3 *Mod.* 79.

[6.] The defect in *form*, however, was amendable. The verification to the country could have been stricken out; and this would have cured the irregularity. But the plea was de-

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murrable for *substance*. It was not a plea to the *gist* of the action, which was the bills or notes of the bank, and consequently, did not lie. In an action of *debt* on a record, *when it is the foundation of the action*, the plea of *nil tiel record* is proper, either where there is no record, or where there is a variance in the statement of it. 2 *Sanders' Plead. and Ev.* 754. *Com. D. Pleader*, 2 *W.* 13, and *Record*, *C.*

[7.] It is next insisted that the judgment against Robert B. Alexander, as assignee of the bank, is void for want of jurisdiction in the Court rendering it—the defendant himself being the presiding Judge who awarded the judgment.

This is not really a question of jurisdiction. The *Superior Court* of Muscogee County unquestionably had jurisdiction, both over the person and subject matter. The objection is to the Judge who presided, on account of his being a party.

Passing by the propriety of attacking a judgment thus collaterally, and the fact that as assignee of the bank, Mr. Alexander was the mere agent of the law, having no personal interest whatever in the matter of litigation, we see no reason why a Judge should be incompetent to *confess a judgment* against himself in a suit to which he is a party in his own Court. It is a convenient practice. There is no *trial*; nothing to *decide* in the cause; and if a Judge has the misfortune to be sued in his own Court, for debt or other matter, against which he has no defence, no good reason occurs to us, why from a mere feeling of delicacy, he should be forced to call in the Justices of the *Inferior Court* or a Judge from another Circuit. The practice has been otherwise, and we should be reluctant to hold that a Judge was disqualified from acting to that extent in a suit to which he was a party.

The next error alleged is that at the time the plaintiff recovered his judgment against Alexander, that he was not in fact the assignee of the bank.

In support of this assignment, *Dougherty vs. Bethune*, (7 *Geo. Rep.* 90,) is referred to, as an explicit authority upon the very question.

So far as this Court held in that case, that a party is not

stopped from denying *any fact* which may be recited in a legislative Act, the opinion we still think is good law. Such recitals are not *conclusive*. But although they may not be conclusive, a decent respect for a co-ordinate department of the government requires the Courts to treat them as true until the contrary appear; and such was the opinion of this Court in the subsequent case of *Beall vs. Beall*, decided in 1850. 8 Geo. Rep. 210.

We there say, "For we hold that *as to the facts* in this case, (meaning the facts recited in the legislative Acts legitimating the complainants) every Court must receive them as importing verity, to the same extent that the records of the Court are evidence to the Legislature or another Court of the matters of fact transacted in the Court, and of which the record is the memorial." Could language be stronger?

[9.] But would Mr. Alexander himself, if in life, be allowed to dispute the fact that he was the assignee of the Bank? when in that character he had confessed a judgment against himself in a suit at the instance of the plaintiff! We think most clearly not. He would be forever foreclosed from denying the fact. And it would constitute but a poor defence in his behalf to say, as counsel have undertaken to say for him, that he looked upon this and all other suits *at law* against him, "as simply ridiculous."

It is attempted to evade the force of this judgment by representing that the defendant was assignee by the previous appointment of the bank itself; and that he never did accept the legislative confirmation of this private appointment.

That he was sued as assignee, under the Act of 1843, and that he confessed judgment in that capacity, is demonstrable from this view of the transaction. As assignee under *the deed*, he could only be sued in a Court of Chancery, and was amenable alone to that jurisdiction. But the Act of 1843 provides that upon motion to *any Court* in which suit is or may be pending for or against this banking institution, the said assignee shall upon motion and notice to the opposite party or the attorney, be made a party to said suit; and that he shall have full

power to sue and be sued in his said character as assignee, for any demand due to or from said bank. 1 *New Digest*, 121.

I ask how sued? Not to answer for and distribute *the trust funds*, but to prosecute and defend *legal demands*. Legislative sanction was not needed to conduct proceedings in Chancery. Such a grant was wholly unnecessary for such a purpose; "for his very appointment and acceptance of the trust made this an incident of his condition." But it was needed to make him amenable *at Law*.

Suits *at Law* were, no doubt, pending at that very time against some of the banks for failure to redeem their notes. To these it was necessary that the assignee should be made a party; and the Act authorized it to be done. He was made amenable at the same time to any others which might be instituted; and the fact that Alexander could *not* be sued under *the deed, at Law*, and that he might be under the *Statute*, shows that the action was prosecuted under the Statute, and that his confession of judgment was made in that character. It concludes him as well as the defendant below, as to the fact that he is the assignee.

But suppose that this inference is not warranted by the face of this proceeding and the law of the case. Does this impair the force and effect of this judgment? It is immaterial whether it was rendered against him by virtue of the private appointment alone, or under the legislative ratification of it. In either view of it, it is still a valid judgment against him, as the legal representative of the defunct corporation; and it is good for the collateral purpose for which it was introduced, and in our judgment is conclusive against the assignee as well as against the present party, for all the legal consequences resulting from it, unless it can be impeached for fraud.

[10.] The next exception is founded on an alleged variance between the judgment and the execution.

This whole proceeding, as the record shows, was against Robert B. Alexander, as assignee of the bank. The judgment entered up was, that "it is considered by the Court, that the plaintiff do recover of the defendant, as *assignee of the Planters' and Mechanics' Bank of Columbus, &c.*" The execution which

issued ran thus—"We command you of the goods and chattels, lands and tenements of Robt. B. Alexander, *as assignee* of the Planters' and Mechanics' Bank of Columbus, you cause to be made," &c.

In the judgment of this Court, the legal effect of the terms used, is precisely the same. Both the judgment and the execution are against the property of the bank in the hands of the assignee. And even if the alleged variance between the judgment and the execution existed, it is an irregularity merely, which is clearly amendable; and one which does not vacate the *fi. fa.* The process is good until set aside, and this can only be done at the instance of the party to it, and in a proceeding directly instituted for that purpose.

[11.] The next exception is that the Sheriff made his return of *nulla bona* on the execution previous to the return day of the suit.

In *Lichten & Barker against Mott*, 10 Geo. Rep. 138, this Court held that for the purpose of fixing bail, the *ca. sa.* against the principal must be returned to the next succeeding term of the Court from which it issued; and that no *intermediate return* is sufficient to fix the bail; neither can it be regarded as the return required by law. With this decision we are still satisfied, notwithstanding the conflicting authority read from the Courts of sister States, whose Statutes are dissimilar to ours upon this subject.

There is a manifest distinction, however, between a *ca. sa.* and a *fi. fa.* In the former it is the duty of the Sheriff to retain the process in his hands until the next term of the Court, to enable him to arrest the defendant if practicable; and to enable the bail to surrender his principal in his own discharge to the custody of the officer at any time before final judgment. Not so with the *fi. fa.* The Sheriff must make search in time to levy on the property of the debtor and bring it to sale before the next term of the Court to which the process is returnable; otherwise he will make himself personally liable.

Besides, in *Lichten and another vs. Mott*, it did judicially appear that the *ca. sa.* although returnable to May Term, 1847, of

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the Superior Court from which it issued, was returned and filed in the Clerk's office on the 21st day of April, 1847, the same day on which the entry of *non est inventus* was made. Here the *fi. fa.* issued the 18th day of February, 1848, and was executed on the 17th day of March, thereafter. But it does not appear from the record, but that the return of the execution was in fact made on the first day of the next term.

[12.] In *Igod & Addison et. al.* (5 *Hov. Miss. Rep.* 432,) the Court of Errors held that the return of the Sheriff upon the execution of "no property found," furnishes no evidence that the process was returned into Court on that day; that this is matter in pais; and that parol evidence was admissible to show when the execution was returned to the Clerk's office.

[13.] The legal inference in this case is, that the Sheriff, after making the entry of *no property*; put the execution in his pocket and kept it until the proper return day. In other words that he did his duty.

[14.] In *Wilcox vs. Ratliff*, (5 *Black's Rep.* 561,) this identical objection was made, that the officer should not have returned the execution *nulla bona*, without taking the time allowed by law to find property. But the Supreme Court of Indiana held that there was no ground for this objection; that when the officer having in his hands a *fieri facias* has made one full examination for goods without success, he is at liberty to return the execution, *nulla bona*.

[15.] Plaintiff during the progress of the trial, offered to introduce Abraham B. Ragan, as a witness in said cause; and the defendant objected thereto, on the ground that the said Ragan was a stockholder in the bank; which objection was overruled. And to this ruling the defendant excepted.

We see no objection to the competency of Mr. Ragan. He was a stockholder himself, and offered as a witness in a suit against another stockholder. He may not have been a good witness for the defendant; we do not say that he would not be; that he was admissible for the plaintiff, we have no doubt.

As all the other assignments grew out of the charge of the

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Court, we will transcribe that *entire* ; and then dispose of each specification in its order.

The plaintiff having closed his case, and the defendant introducing no evidence, the same was argued before the Jury, and the Judge charged, amongst other things—" That the transfer of stock in the stock-book of said bank to the defendant, was *prima facie* evidence of his ownership thereof; and that it was not necessary to the plaintiff's recovery that he should prove the same by other evidence ; or that he should prove the defendant's purchase or subscription for the same, or his assent or knowledge of said transfer in his name or to him ; that said transfer being made on the books of said bank, kept and used for that purpose, his assent thereto would be presumed ; and that it was incumbent on the defendant to plead and prove that he did not own the same, and that it was for the Jury to decide (if at all) how far the evidence had rebutted such presumptive evidence on the said transfer book, and if it had been rebutted, then the defendant was not liable as the owner of said stock.

He further charged the Jury, that the defendant was liable to bill-holders to the extent of the value of each and every share of stock held by him, and in proportion as the number of his shares is to the whole number of the shares of the bank ; and that said defendant, after paying bill-holders in this proportion to the extent of the value of each and every share at \$100 per share, could plead said payment in discharge of further claim or liability to other bill-holders, and that it was not necessary to the said plaintiff's recovery in his action that he should aver and prove the extent of notes issued by said bank and outstanding ; that whether the same was \$250,000, 1 million, or 3 millions, it made no difference as to defendant's liability ; that when the defendant had paid bill-holders to the extent of his liability, such payment was ample protection against the claim upon him of other bill-holders ; that the amount of bills and notes unredeemed by said bank was not an element in the calculation of the extent of the defendant's liability to the plaintiff ; and if it was, it was matter for plea and proof by said defendant, and not necessary to be averred and proven as part of said

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plaintiff's case, or in any manner necessary to his recovery; that defendant's liability as stockholder to said plaintiff accrued whenever his (said plaintiff's) legal remedies against said bank for the payment of the bills held by him were exhausted, to wit: a judgment against the assignee and return of *nulla bona*; that it was not necessary for plaintiff to go into Equity to exhaust equitable assets or to pursue the assets in the receiver's hands (if any) before he could go upon the stockholders for a *pro rata* share of his debt.

That the Act of the 23d December, 1843, expressly appointed Robert B. Alexander assignee of said Bank, and that the same being a public law, it was not incumbent on said plaintiff otherwise to aver and prove said appointment, and that the judgment against said assignee, *fi. fa.* and return of *nulla bona* thereon, was equivalent to the same being against said bank, and that a return of *nulla bona* against said assignee on the said *fi. fa.* was *prima facie* evidence of the exhaustion of the property of said bank, but was not conclusive. If the defendant had shown that at the time of said return, there was property of said bank subject to levy and sale under said *fi. fa.* then the plaintiff must dismiss the suit against the defendant, and proceed against said property, and could not maintain his action against defendant until he had exhausted said property.

That the return of *nulla bona* on said *fi. fa.* against the assignee even though made before the return day of the *fi. fa.* was *prima facie* evidence of there being no property upon which to levy the same, and that it was not necessary that the Sheriff should have retained in his hands said *fi. fa.* until the return day thereof.

That if mere possession of the banking house and lot was relied upon by the defendant, as *prima facie* evidence of the title in said bank or its assignee, then such possession must have continued up to or subsequent to the rendition of the judgment against said assignee. That in order for such possession to be any evidence of title, it was incumbent on the defendant to prove the same in said bank or the assignee, or that the person in possession held under him or subsequent to the date of the judgment.

That the Court was constituted by law, the Judge of the Law in civil cases; that the Jury was bound to regard the law as stated by him, to be the law of the case; that if he decided wrong, and the law provided a remedy or correcting tribunal, then his decisions might be reversed and corrected. If there was no corrective provided by law, then the parties would have to submit; but in either case, it was wise and proper that the Judge should be entrusted with the power to determine the law, and that it was the province and duty of the Jury to apply the law given in charge to them by the Court, to the evidence, and find accordingly; that in this case he had given them the law as he understood it. The counsel on both sides had stated their views of the law and had claimed to give their honest opinions; the Court had no doubt they were sincere and honest in the expression of their opinions; he claimed to be equally so in the expression of his; that he was certainly indifferent in feeling to the parties, and had no earthly interest in the case, although he regretted to say that he had the evening before received through the Post Office, an anonymous letter, charging him with corruption, and being the partner of Mr. Dougherty in these bank cases, and threatening personal violence to him; that he hoped that none of the defendants to said bank cases had written that letter; one thing was certain, no honorable man had written it; those were most apt to be suspicious who were themselves corrupt; he had important official duties to perform under the sanction of an oath; he would perform them fearlessly and to the best of his ability, no matter who was pleased or displeased thereby."

At the conclusion of the charge, and at the hour of 9 o'clock, A. M., the Jury retired to consider of their verdict, and after remaining in their room until 2 o'clock, P. M., again returned at their own request, to the Court room, to receive the further instructions and charge of the Judge, and reported through their foreman, that they disagreed as to the effect of the testimony of the witness Ragan, with regard to the assets turned over to him by W. Lee, and whether said testimony was ruled out or was before them for their consideration.

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The Court then and there further charged the Jury—"That said evidence was not ruled out, and was before them; and that the legal effect thereof was not to defeat the recovery of the plaintiff, unless it proved property, the neglect of levy and sale under the *fi. fa.* against Alexander, as assignee, and that a return of *nulla bona* on said *fi. fa.* was evidence of the insolvency of said bank, sufficient to give bill-holders their remedy against stockholders; and that the mere fact that Ragan received notes from Lee, was not sufficient to prove the same the assets of said bank, but that to establish the fact that they were the property of said bank, it must be proved that they were held by the bank or had been derived from a previous assignee of the bank, as assets of the bank."

To all of which charge, and to each of the instructions as severally and specifically given, the defendant by his counsel excepted.

The more important portions of this charge having been already considered and disposed of, it only remains to examine certain parts of it upon which error is specially assigned.

[16.] 1st.—The first question which arises, is as to the sufficiency of evidence. The transfer-book of the bank had been given in evidence; the defendant had pleaded that with the exception of one hundred shares, to wit: 50 shares transferred to him by M. W. Turner, 20th February, 1838; and 50 by A. B. Ragan, transferred March 28th, 1838, he never owned or held any other or further number of shares in said bank; and that if the books of the bank showed any other or further transfer of shares to him, to wit: a transfer on the 19th of May, 1838, by Hines Holt, of 188 shares, and Walter T. Colquitt, of 188 shares, transferred to the name of the defendant; that the said transfer was made by the said Holt and Colquitt at the instance of, and for the sole and exclusive benefit of one Daniel McDougall, and without the knowledge and consent of the defendant, and that the same was so known to be the fact by the directors and officers of the bank, and that he, the defendant, never did assent to the same. That he never voted on said last mentioned stock, nor did any other act in relation thereto,

by which his assent to said transfer could be implied; nor was he in any manner liable therefor.

The testimony of Ragan was that he was the Cashier of the Bank when these transfers were made; that the book offered in evidence was the transfer-book kept by the bank, for the purpose of transferring stock from one stockholder to another on said book; that he transferred to the defendant the 50 shares the 28th day of March, 1838, mentioned on page 35; and that he recognized his signature to the other transfers made by Hines Holt, Jr., and W. T. Colquitt, each of 188 shares, on the 19th day of May, 1838; and that he had no doubt they were made by Holt and Colquitt, as it was his duty as Cashier to witness such transfers; and he was not in the habit of subscribing his name as witness unless the transfers were made as recorded; but that he had no recollection of the same, or that the defendant was or was not present when the same were made, or then or afterwards assented to them, or that he had any knowledge thereof.

Upon this evidence the charge of the Court was predicated; namely, that the transfer of stock, in the stock-book of the bank, to the defendant, was *prima facie* evidence of the ownership thereof; and that it was not necessary to the plaintiff's recovery that he should prove the same by other evidence, or that he should prove the defendant's purchase or subscription for the same, or his assent or knowledge of said transfers in his name or to him. That said transfers, being made on the books of the bank kept and used for that purpose, his assent thereto would be presumed; and that it was incumbent on the defendant to plead and prove that he did not own the same; and that it was for the Jury to decide (if at all) how far the evidence had rebutted such presumptive proof on the said transfer-book; and if it had been rebutted, then the defendant was not liable as the owner of said stock.

This objection turns upon an alleged improper direction by the learned Judge, upon the sufficiency of the proof to show, *prima facie*, the acceptance by the defendant of the transfer of the three hundred and seventy-six shares of stock by Holt and

Colquitt ; and it is undoubtedly one of a very important character, as it involves the practice of Stock Exchange generally. I have no doubt that the understanding of the country is, that bank books are admissible to prove the transfer of stock.

[17.] And although this transfer be neither literally and technically a "deed, bond, bill, single or several note, draft, receipt or order," in the language of the Judiciary of 1799, still we are strongly inclined to hold that if this defendant was sued upon this transfer of stock, from which his assent and acceptance are implied, that he ought not to be permitted to deny that this was his act, unless he would make affidavit to the truth of his answer and defence. This would certainly be in accordance with the spirit, if not the very letter of the Statute. This transfer, if *bona fide*, is a contract of purchase between him and the former owners, for this stock, which is reduced to writing by the Cashier on the books of the corporation, kept for that purpose. If the action against him was upon this contract, would the defendant be permitted to deny that it is his act, *or deed*, if you please, except under oath? And would not this construction, imposing as it does, no undue burden upon the party, obviate a difficulty which may otherwise greatly embarrass the Stock Exchange business? In ninety cases out of a hundred, the transfer on the books of the corporation is the only evidence in the matter; and when sought to be made liable upon this transfer, while he ought not to be required to prove a negative, to wit: that he did not agree to the transfer; still it is not unreasonable to hold that the defendant should verify his plea of repudiation. The onus would then be cast upon the opposite party, to prove that the transfer was made with the knowledge and consent of the defendant.

But there is another view of this question. By the charter, a book was to be kept for the purpose of transferring the stock of this bank. This book, the charter declares, shall be subject to the inspection of the stockholders. Mr. Thornton, the defendant, was the owner of a hundred shares of the stock of this company, at the time of this alleged transfer from Colquitt and Holt. In a contest between him and the bill-holder, will he not

he bound by this transfer, the entry of it being made on the books of the bank by the cashier of the corporation of which he was a member, and free access being provided to him for the purpose of inspection? It would seem that he cannot be deemed a stranger to the transaction; especially with one who is a *stranger* to the corporation. Upon this point I have felt, I confess, more embarrassment than any other contained in the record.

[18.] 2d. The next complaint is, that the Judge erred in that portion of his charge in which he said to the Jury, that if mere possession of the banking house and lot was relied upon by the defendant, as *prima facie* evidence of title in the bank or its assignee, then such possession must be continued up to, or subsequent to the rendition of the judgment against said assignee; that in order for such possession to be any evidence of title, it was incumbent on the defendant to prove the same in said bank or the assignee, or that the person in possession held under him, at or subsequent to the date of the judgment.

This charge was founded upon a part of the 10th plea, which was not demurred to, and the evidence of A. B. Ragan.

The portion of the 10th plea referred to was, that "there was real and personal estate belonging to the Planters' and Mechanics' Bank of Columbus to the value of fifty thousand dollars, upon which the plaintiff had not levied his execution; and as part of said property, there was the late banking-house and lot occupied and owned by said bank at the time of the forfeiture of its charter, and a large three-story brick building, at the upper end of Broad street in the City of Columbus, known as lot No. 186, and the north half of City lot No. 183, which was of the value of \$50,000, and subject to levy and sale under the plaintiff's demand.

The evidence of Ragan, in reference to this matter was, that the bank in 1838, built a banking-house in the City of Columbus, on the west side of Broad street, and occupied the same up to the time of its final failure in the spring of 1843. Since that time, the banking-house had been in the possession of John

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Banks, the agency of the Bank of Brunswick, Alfred Iverson, and others.

The objection to the charge is, that it was hypothetical and wholly unauthorized by the plea and proof; there being no pretence in any part of the case, that the title to this banking-house and lot and to the other real estate named, was ever in the assignee of the bank. Moreover it is argued, that the banking-house and lot was proven, *prima facie*, to be the property of the bank; and such property as was by law and the repeated adjudications of this Court, the subject of levy and sale, under the *fi. fa.* against the bank. That Ragan having proven possession and occupancy of the bank up to its final failure in 1843, in the absence of other evidence, this was title; and such as subjected the property to seizure and sale under the execution.

It is admitted that the charge of the Court may have been well enough, if there had been a levy and claim, or even any other title set up in any third party. But having shown possession and occupancy up to the time of final failure in 1843, it ought to have been left to the Jury to say, even if a transfer had been relied upon to any party, and especially to some of those proven to have followed in mere possession, whether such transfer, *after final failure* in 1843, could be made, except in *fraud* of the rights of *creditors*.

It will be observed, that by the return of *nulla bona* upon the execution against the assignee of the bank, the plaintiff had established a case of *prima facie* insolvency against the corporation, so as to entitle him to proceed against the stockholder, under the *ultimate redemption* clause in the charter. The proof offered in relation to this banking-house was to rebut the evidence of the insolvency of the bank, and to show that there was property belonging to it, subject to the plaintiff's demand. There was no evidence of *title* offered. *Possession* alone was relied on to prove property in the bank. Wherein does this case differ from that of a levy and claim, in which issue, it is admitted, the charge would have been unexceptionable?

But in any event, was not the learned Judge right in giving

the instruction which he did to the Jury? Relying upon occupancy alone as the evidence of title, ought not the possession to have continued in the bank, or its assignee, up to or subsequent to the rendition of the judgment against the assignee? or was it not incumbent on the defendant below to prove that Banks, the Brunswick Bank and Iverson, held under the corporation, or its legal representative? We think so, most indubitably.

But it is said that the charge was unauthorized, inasmuch as there was no pretence that the banking-house was ever in possession of the assignee.

Concede that to be so, the law, as an abstract proposition, was nevertheless correctly submitted; and it does not lie with the defendant to find fault because the charge was more favorable than he asked for, or even than the testimony authorized. It is true, that there was not a particle of proof to show that Alexander, the assignee, was in the occupancy of this property, or that those persons who were in possession since the failure of the bank, held under the assignee. And yet, the Court charges, that if the Jury should find either of these facts to exist, that then the verdict should be for the *defendant*. Had the verdict been the other way, we must say there would have been good cause of exception on the other side.

Nor is it true, that the testimony established that the banking-house and lot was, *prima facie*, the property of the bank, so as to subject it to levy and sale at the instance of the plaintiff's demand. It may have been in the occupancy of the bank up to the time of the *failure* in the spring of 1843, and conveyed subsequently to that time, to some of those persons who were afterwards in possession, according to the evidence of the witness Ragan, or to any body else; and such transfer, if *bona fide*, would have been good against Lane, the creditor.

In *Carey vs. Giles*, (10 Ga. R. 9,) this Court held that an assignment made by an *insolvent bank* to pay an existing debt to a creditor, is neither void by the general law, nor by the Act of 1818, even where the effects assigned are larger than would be reasonably sufficient to pay the debt, and accompanied with a

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stipulation that the excess shall be returned to the bank ; but on the contrary, that such transfer was, *per se*, valid.

In one of the earliest decisions made by this Court, it was held, that the fact that a man is *insolvent* when he transfers his effects, does not make the conveyance void ; but that he may sell his estate ; the Act of 1818 not divesting him, because he is *insolvent*, of the right of dominion over his property. 1 *Kelly*, 157.

Artificial persons or corporations enjoy the same right in this respect, as natural persons. And notwithstanding the soundness of the principle in regard to preferences, as applied to corporations, is doubted in *Robins et al. vs. Enly et al.* (1 *Smedes and Marshalls' Chancery*, 208, 259, 265,) and a general assignment by a bank, though admitted to be valid, was declared in *The State vs. The Real Estate Bank*, (5 *Pike*, 596, 607,) to be a good cause of forfeiture of its charter ; still, that a bank or other corporation, in a state of insolvency, possesses the same right that an individual possesses to make a transfer, is settled by a conclusive weight of authority. *Callin vs. Eagle Bank*, 6 *Conn.* 233, 242. *Springs Bank vs. Bates*, 8 *Ib.* 506, 512. *The Bank of Maryland*, 6 *Gill. & Johnson*, 206, 219. *Bank U. S. et al. vs. Hudh*, 4 *B. Monroe*, 423, 429. *Dana vs. The Bank of the United States*, 5 *Watts & Serg.* 224, 243. *Hopkins et al. vs. The Gallatin Turnpike Co.* 4 *Humphreys*, 403, 410. *Conway et al. ex parte*, 4 *Pike*, 305, 353. And see opinions of *Mr. Kent*, *Ib. App. XII.* and in 6 *Humphreys*, 532.

If, then, the presiding Judge had left it to the Jury to say, as it is insisted he ought to have done, "even if a transfer had been relied upon to any party, and especially to some of those known to have followed in mere possession, whether such transfer, after final failure in 1843, could be made, except in fraud of the rights of creditors," (*Brief*, 105,) it would have been misdirection ; the law being well settled that this may have been done.

[19.] 3d. The next ground of error is, as to what transpired when the Jury returned into Court, after having retired to their room, to receive at their own request, further instructions as to

the effect of the testimony of the witness, Ragan, with regard to the assets turned over to him by Mr. Lee, and to inquire whether said testimony was ruled out, or was before them for their consideration.

The Jury were informed that the evidence was not ruled out, but was before them; and that the legal effect thereof was not to defeat the recovery of the plaintiff, unless it proved property the subject of levy and sale under the *fi. fa.* against Alexander as assignee, and that a return of *nulla bona* on said *fi. fa.* was evidence of the insolvency of said bank, sufficient to give billholders their remedy over against stockholders. And the mere fact that Ragan received notes, &c. from Lee, was not sufficient to prove the same the assets of said bank, but that to establish the fact that they were the property of said bank, it must be proved that they were held by the bank, or had been derived from a previous assignee of the bank, as assets of the bank.

That it is error in the Court, either in its charge or during the progress of a case, to express, or even intimate to the Jury, an opinion upon the facts or upon what has or has not been proved, we readily grant. Still, it is the undeniable privilege, and even duty of the Judge, when called on, as he was by the Jury in this case, to state the *legal effect* of testimony. We are inclined to think—the notes in question being turned over by Joseph A. L. Lee, to Ragan, as the assignee of the bank—that, without further proof, perhaps they were, *prima facie*, the property of the bank. But suppose they were, Mr. Ragan, who had been appointed receiver in the place of Mr. Alexander, took them in his official character of receiver; and these assets, if collectable, and the property of the bank, could not be reached and made liable to the plaintiff's demand by process of garnishment or any other *legal means* at his command; and consequently could not defeat his remedy over against the bill-holder. See the case of *Field vs. Jones and Schley*, decided the present term.

[20.] 4th. It is assigned as error, that the Court said to the Jury, "if he decided wrong and the law provided a remedy or correcting tribunal, then his decision might be reviewed and corrected."

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It is urged that between this point in this case and the similar point in *Monroe vs. The State*, (5 Ga. R. 86,) that there is not a shade of difference; and that this Court decided in the case of *Monroe*, that it was error in the presiding Judge to remind the Jury of the existence of a Supreme Court to which the defendant could carry his case up, &c.

So far from the decision in the *Monroe* case, and the reasons for it, amply and fully sustaining this assignment, we think they differ in *totò cælo*.

In *Monroe's* case, the Court, after admitting certain testimony, in its charge to the Jury stated, that he greatly doubted the propriety of having done so. Still that having been received, the Jury were bound to consider it in making up their verdict; and then added, that if error had been committed through haste or inadvertence, that the defendant could take the case up to the Supreme Court and have it corrected.

And this Court being of the opinion that the evidence referred to by Judge *Warren*, was both legal and proper, we felt constrained to say that its force should not have been weakened by this intimation from the Bench. That the remark, however well intended, was calculated not only to lessen the sense of their own responsibility, but at the same time to convey to the Jury the idea, that the proof already before them was not sufficient to acquit the defendant. This was the opinion of this Court in that case, and the reasons for it. In the case before us, the Court after stating that he was constituted the Judge of the law in civil cases, and that the Jury were bound to regard the law as stated by him to be the law of the case, added that if he decided wrong, the Supreme Court alone could correct his errors. Meaning thereby, to give the Jury to understand, that it was for the appellate tribunal, and not for them, to review his judgments.

The two cases are as widely apart as are the poles from each other. In the one, the reference to the Supreme Court was, under the circumstances, improper and calculated to injure the party. In the other, it was altogether harmless, to say the least of it. Perhaps it was not amiss to remind the Jury, that the

privilege and responsibility of rectifying the errors of law committed by the Court, did not rest with them, but that the Constitution of the State had conferred this power elsewhere. After all, the new trial in Monroe's case was not awarded on this ground, notwithstanding it was considered as an irregularity by this Court.

[21.] 5th. It is further insisted, that in the particular charge under review, it was error in the Judge to say to the Jury that, "the Jury was bound to regard the law as stated by him, to be the law of the case."

It will be admitted by all who have read our Reports, that no Court in this country has gone farther than we have, to see to it, that the Judge did not invade the province of the Jury.

[22.] Even where verdicts have been manifestly against the weight of evidence, still we would not suffer them to be disturbed, unless they evinced by their gross injustice, passion, partiality or prejudice. We believed that the law conferred upon them this power; that to the Jury, as a favorite and almost sacred tribunal, was committed exclusively, the task of examining the testimony and passing upon the merits of the case, according to their opinion of the facts and circumstances; that we were bound to presume in favor of the purity of their motives, and that it was not until the result of their deliberations was such as to shock both the understanding and the moral sense, that the Courts were at liberty to interpose and control their verdicts. *Beyond this we will not go.*

[23.] For while we have always respected and secured to the Jury, to the fullest extent, the right to decide upon the facts, we will take equal care that the rights of the Court to decide the law, shall never be impaired or questioned by the Jury. Establish a contrary rule and there is no longer any certainty in the law. The peace of the country, the security of life, liberty and property, are undermined and destroyed. A state of things would ensue which every good man should deprecate.

The extraordinary power claimed for the Jury, is invoked from the comprehensiveness of the terms of the oath administered to a Special Jury. They are sworn "a true verdict to

give, according to equity and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge," &c.

[24.] By looking back through the old Statutes, this form of oath, it seems, was that which was originally prescribed for Juries in *Equity* causes proper; and for that purpose it was framed with technical accuracy and aptitude. Its phraseology is not exactly suitable to *appeal* causes on the Common Law side of the Court. But take it as it is, and what is the obligation which it imposes? To give a verdict according to some vague, undefined and undefinable opinion which the Jury may entertain of *Equity*? Certainly not. But according to a system of jurisprudence, governed by established rules, and bound down by fixed precedents, from which the Jury are not at liberty to depart, however liable to objection these rules and precedents may be, in their judgment. As to the facts and circumstances of the case, they are to be governed by the *opinion* they may entertain of the evidence. But as to the *law*,—for law and equity in the oath are convertible terms—they are not at liberty to theorize or to speculate as to that. This they must receive at the hands of the Court, and administer it faithfully. And new trials will be granted so long as their verdicts are contrary to it.

[25.] It would be strange indeed, if the substitution of the word "*equity*" for *law*, in the oath directed to be administered to a Special Jury, should work an entire revolution in the judiciary of the country! Had the Legislature intended making such a change, they would have effected it in some more explicit mode. Such tremendous consequences would not have been suspended upon the doubtful construction of the Juror's oath.

It is our settled conviction, that the rule which is co-eval with jurisprudence itself, still exists here in its utmost latitude and vigor, viz: that it is the province of the Court to determine the law; and that if Juries will take it on themselves and decide differently from the Court, a new trial should be granted *toties quoties*.

6th. The last complaint which we shall notice is, what the counsel is pleased to characterize as one of the most remarkable features in the charge, namely, the reference which the

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Judge made to his having received through the post office, an anonymous letter, charging him with corruption and being the partner of Mr. Dougherty in these bank cases, and threatening him with personal violence.

I admit that a Judge, when he enters the temple of justice, should say to his passions (if possible) as Abraham did to the young men, when about ascending Mount Moriah: "abide ye here, while I go up to worship." But harrassed and baited, as Courts too often are, by the angry strifes and conflicts of counsel, who is sufficient for these things? After all, we look upon the remarks which fell from our learned brother on this occasion, as more a matter of judicial *taste and manners* than of *law*; and we know of no safer depository for questions of this sort, than the accomplished *gentleman* who presides over the Chattahoochee Circuit.

We believe that we have covered every point, great and small, raised upon this record. We have intended to do so, and the conclusion of the whole matter is, that the judgment below is right, and should be affirmed.

No. 65.—EDWARD CAREY, assignee, &c. plaintiff in error, vs.
HAMPTON S. SMITH, defendant in error.

- [1.] An injunction bill which has been sworn to, cannot be amended, by striking out material and substantive matter and statements, allegations and charges; they are to be corrected by the addition of explanatory or supplemental statements; and this rule is as applicable to *all sworn bills*, as to those where injunctions are outstanding.
- [2.] Amendments to a bill can only be granted, when the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor *repugnant* thereto; and a party under the privilege of *amending*, is not to introduce matter which will constitute a *new bill*.
- [3.] An injunction bill will not be amended, unless the proposed amendments

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are distinctly stated to the Court, and verified by the oath of the complainant, nor unless a sufficient excuse is rendered for not incorporating them in the original bill; and the application to amend must be made as soon as the necessity of the amendment is discovered.

[4.] An amended bill is considered as an original bill.

[6.] In Courts of Equity, the general rule is, that where parties are concerned in *illegal* agreements or other *illegal* transactions, whether they are *mala prohibita* or *mala in se*, the Court, following the rule of law as to participators in a common crime, will not interpose to grant any relief; acting upon the well known maxim, *In pari delicto, potior est, conditio defendentis et possidentis*. In all such cases, the rule is for the Court to leave the parties where it finds them, giving no relief and no countenance to claims of that character.

In Equity, in Muscogee Superior Court. Decision on demurrer, by Judge IVERSON.

Edward Carey, as assignee of the Bank of Columbus, brought an action at law against Hampton S. Smith, as a stockholder of the Planters' and Mechanics' Bank of Columbus, to recover from him the amount of his ultimate liability for the redemption of the bills of the Planters' and Mechanics' Bank, held by the Bank of Columbus. The declaration averred that most of the bills were issued in March and October, 1838.

Smith filed his bill in Equity enjoining the above suit, and averring substantially, that long before the institution of the suit, the charters of both the Planters' and Mechanics' Bank and the Bank of Columbus, were forfeited by the judgment of the Superior Court of Muscogee County; that Carey "has not been constituted and appointed in any legal way or by any legal authority, assignee of the Bank of Columbus, being made by a Board of Directors not legally qualified and appointed; that the bills sued on were issued and put in circulation when the said bank was in a state of failure and suspension, and so known to be, by the Bank of Columbus;" that these bills were not received by said Bank of Columbus until 1842, when both banks were in a state of suspension, and unauthorized, under their charters, to transact business. Proceedings at the time were pending to forfeit their charters; that when the Bank of

Columbus received these bills, they knew that complainant was no longer a stockholder, having transferred his stock long prior to that time; that said bank positively refused to receive said bills upon the responsibility of the bank or its stockholders, but received them upon the condition that one John Banks and other directors and stockholders of the said Planters' and Mechanics' Bank would execute their bond, personally binding themselves to redeem said bills, if the Bank of Columbus would receive them; such bond was executed and the bills received upon the responsibility of this bond; that this contract was "fraudulent and improper" on the part of the banks, and ought not to be enforced against its stockholders. The bill then charged as follows:

** "Your orator states with regard to the stock held in his name, as appears upon the books of said bank, he owned and held in his own right and for his own account only 1425 shares thereof; and as to the balance which appears by said stock account, to have been transferred to him, it was not so transferred with a view to any ownership thereof by him; that he at no time made any payment therefor, either in money, by note or otherwise, or any promise or contract for payment therefor, except a premium of one dollar per share, to S. A. Bailey, which he paid by the direction of Daniel McDougald. He states that said Planters' and Mechanics' Bank was organized, as he believes, under its charter, in the spring of the year 1837; that the stockholders who then took the stock, subsequently declined to prosecute the business of banking, without having issued any bill or incurred any liabilities within the knowledge of your orator, and some of them transferred their stock to your orator; that subsequently, and in the year 1838, it was concluded to prosecute said enterprise, and this defendant was induced, for the benefit and at the instance of others; to collect together other purchasers of said stock, and in doing so, procured it to be transferred to him, without his assuming any liability therefor, either to the bank or any other person, except the payment to Bailey before stated. This stock, to the number of 3564 shares, thus transferred to your orator, as will be seen by reference to said stock account, was held in his

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name, the greater portion thereof only a few days, some of it a few hours, and transferred to those persons for whom it was procured, viz:—200 shares to S. A. Bailey, 600 shares to D. McDougald, 600 to M. W. Perry, 200 to John Banks, 1689 other shares to D. McDougald, and 273 other shares to M. W. Perry; and your orator states that he at no time voted upon or claimed said 3564 shares in his own right; that he was not recognized or considered as the owner thereof by the bank or any of its stockholders, and that the same was transferred to the several persons before stated, before said bank issued a bill or incurred a liability of any sort.

“It is proper that your orator in this connection, should state that the 900 shares transferred by him on 27th March, 1838, in equal numbers (300 to each) to John E. Morgan, Wm. A. Redd, and Wm. Redd, senior, were his, and that whatever liabilities may have attended to the ownership thereof, are his, as the same are transferred to and held in the names of the said Morgan and Redd, for your orator's benefit, and without the intention on the part of the said transferees in any manner to hold or claim the same for their own account; and that the said stock so held by said Morgan and Redd, was transferred by them or by your orator at their request, as will appear upon the stock ledger and transfer-book, on the 28th October, 1838—which transfer was made upon the contract and for the exclusive benefit of your orator, and as he believes, without their knowledge. (Here was inserted complainant's stock account, amounting to 4989 shares.) All of which was transferred prior to the contract with the Bank of Columbus, before set forth. That when the Planters' and Mechanics' Bank commenced business in February, 1838; it did so as a suspended bank; that during all the time the complainant was a stockholder, though the bank did not pay specie, it was at all times fully and abundantly able to meet all its liabilities, and did meet them in every instance when called upon, to the satisfaction of all persons having any claims upon it of any character whatever.” **

The bill further charged, that for more than two years after the transfer of all complainant's stock, the bank continued busi-

ness, "sometimes paying specie and sometimes not," and was during all the time solvent; that the persons to whom he transferred his stock, were at the time "for the most part solvent;" that long after he ceased to be a stockholder the Legislature passed an Act relieving the bank from the effect of the suspension, if it would resume and continue specie payment; and that in pursuance thereof, the bank did resume specie payment, but how long it continued so to do, complainant was unable to say; that sometime during the year 1841, in March or April of that year, said bank, as well as the bank of Columbus, failed to redeem their bills *in specie*, and their respective charters were *forfeited*; that complainant did not give notice as required by the charter, immediately on transferring his stock, but did so long before the final failure of the bank, and before the arrangement between it and the Bank of Columbus, hereinbefore set forth; that if liable at all, it is only for the *ultimate* redemption of the bills, and that the assets of the bank in the hands of the assignee had not been exhausted, especially the balance of the capital stock unpaid, amounting to \$750,000; that the assignee of the Bank of Columbus had compromised with John Banks and others for their liability for the sum of \$6000; (the bill sought for discovery as to this arrangement); that the banking house was *liable* to pay the debts of the bank, and that Carey as assignee, should not go upon complainant until he had exhausted his remedy upon the bond, and the equitable assets in the hands of the receiver. The bill prayed an injunction, and was sworn to by H. S. Smith, the complainant.

To this bill, Carey, assignee, demurred on various grounds, and among others, for want of Equity, submitting to answer such portion of the bill as sought for discovery.

Subsequently complainant served the defendant with notice of an amendment by which he sought to strike out all that portion of the original bill copied above and included within the asterisks, (**) and to insert in lieu thereof an amended bill, in which, among other things, it was charged, that shortly after the organization of the corporation, it was resolved, "that in consequence of the derangement of the monetary system throughout the Uni-

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ed States, it would be imprudent for the bank to make any issue of bills, and therefore that the bank would not commence operations, but for the present put out at interest the capital paid in; that subsequently, it being deemed advisable to call in the capital and commence business, certain stockholders, amounting to 3635 shares, being unwilling to continue their investment, transferred their stock to complainant, merely to be transferred to others as they might desire it, which was accordingly done, before a single bill was issued. The amended bill set out more specifically the arrangement between the Bank of Columbus and the Directors of the Planters' and Mechanics' Bank—the giving of the bond by John Banks and others, and charged that this arrangement was made for the benefit of the directors giving the bond, and the bills were received upon their credit and responsibility; that Carey, as assignee, has since released the obligors in the bond from all liability thereon, and is now seeking to make the stockholders responsible for the bills received upon the faith of this bond, by the Bank of Columbus.

Carey filed a demurrer to the bill as amended, to the mode of amending said bill, and as to the relief prayed for, offering to answer the remainder of the bill.

The hearing of the demurrers, and the motion to amend came on to be heard together, when complainants moved still further to amend, by striking out the allegation in the original bill as to the resumption of specie payment by the bank, and also the words, "sometimes paying specie and sometimes not."

Upon argument had, the Court below allowed all the amendments proposed, and overruled the demurrer on all the grounds taken.

This decision is assigned as error.

LAW and W. DOUGHERTY, for plaintiff in error.

B. HILL and COLQUITT, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

This bill is filed by the complainant, for the purpose of enjoining a suit instituted against him by Edward Carey, assignee of the Bank of Columbus, on the Common Law side of the Court, as one of the stockholders of the Planters' and Mechanics' Bank of Columbus, for the ultimate redemption of the bills issued by that bank, according to the provisions of the 11th section of the charter thereof.

The complainant alleges in his bill, that there are various equitable circumstances which ought to exonerate him from the payment of the bills sued on, as a stockholder, and especially, that there was a *fraudulent* combination between a portion of the directors of the Planters' and Mechanics' Bank and the Bank of Columbus, for the benefit of said directors; and that the bills in question were not received by the Bank of Columbus (the assignee of which is now seeking to enforce the payment thereof) on the credit of the Planters' and Mechanics' Bank, but on the credit of a personal guarantee made by a portion of the directors of the Planters' and Mechanics' Bank, for their own personal benefit and private speculation; all of which was well known to the Bank of Columbus, when the bills now sued on were received by the last mentioned bank. The prayer of the bill is, that the assignee of the Bank of Columbus may be perpetually enjoined from prosecuting his said suit on the bills of the Planters' and Mechanics' Bank against the complainant, as a stockholder in the last named bank, and for other relief, &c. To so much of the complainant's bill as sought a discovery from the defendant in relation to the banking house and lot of the Planters' and Mechanics' Bank, and the alleged contract or agreement in regard to the same, the defendant answered. To the other portions of the bill, the defendant demurred. After the demurrer was filed by the defendant, the complainant obtained leave of the Court to amend his bill, by *striking out material parts thereof*, and to make new and distinct allegations in relation to the same subject matter; which was allowed by the Court.

[1.] The defendant objected to the amendment of the complainant's bill, by *striking out* material allegations, admissions,

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and averments contained therein ; insisting that he was entitled to demur to the bill as it originally stood, with the additional matter introduced by way of *amendment*.

The first question to be considered and decided, is, whether a complainant in an injunction bill, which has been sworn to by him, can amend it by *striking out* material averments and allegations contained therein? Such a practice cannot, in our judgment, be sustained, either upon principle or by authority. In *Verplanck vs. The Mercantile Insurance Company*, (1 *Edwards' Ch. Rep.* 46,) this identical question appears to have been well considered, on an application to amend an injunction bill.

[2.] In that case it was held, that material and substantive matter, and statements, allegations and charges, which have been *sworn to*, cannot be *stricken out*; they are to be corrected by the addition of explanatory or supplemental statements; and this regulation was held to be as applicable to ordinary sworn bills, as to those where injunctions are outstanding. It was also held in that case, that amendments to a bill can only be granted when the bill is defective in parties, or in prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor *repugnant* thereto; and that a party under the privilege of *amending*, is not to introduce matter which would constitute a *new bill*.

[3.] In *Rodgers vs. Rodgers*, (1 *Page's Ch. R.* 424,) it was held that an injunction bill will not be amended, unless the proposed amendments are distinctly stated to the Court, and verified by the oath of the complainant, nor unless a sufficient excuse is rendered for not incorporating them in the original bill, and that the application to amend must be made as soon as the necessity of the amendment is discovered. One cogent reason for not allowing a party complainant in a *sworn* injunction bill to *strike out* material allegations and averments therein, by way of amendment, is, that if he should *swear falsely* for the purpose of obtaining the injunction, he might by that means, destroy and obliterate all trace of the *evidence* of his offence. The Court below erred, in our judgment, in allowing the complainant to

strike out of his bill the averments and allegations marked and designated in the record before us.

The defendant was entitled to demur to the complainant's bill as it stood, before the order to *strike out* was made; that is to say, he was entitled to demur to the complainant's bill, as amended by the insertion of the new matter, without any portion thereof being *stricken out*. The bill as it was originally sworn to by the complainant and filed in office, together with the additional matter introduced by way of amendment, constituted *the complainant's bill*, at the time the demurrer was heard and determined in the Court below.

[4.] An amended bill is considered as an original bill. 2 *Madock's Ch. Prac.* 369. At the May Term, 1852, the defendant filed additional grounds of demurrer to the complainant's bill, as amended, the second ground of which is in the following words—“And for further cause of demurrer to said bill as amended, this defendant sheweth that the complainant shews by his said amended bill, he has been guilty of a violation of the charter of the Planters' and Mechanics' Bank, and of committing a gross fraud in the organization of the same, and therefore is not entitled to come into a Court of Equity, and ask relief from the consequences thereof.”

[5.] It is undoubtedly a principle of Equity jurisprudence, that he who seeks equity, must come into Court with clean hands. The general rule is, that where parties are concerned in illegal agreements or other illegal transactions, whether they are *mala prohibita*, or *mala in se*, Courts of Equity, following the rule of Law, as to participators in a common crime, will not interpose to grant any relief; acting upon the well known maxim, *In pari delicto potior est conditio defendentis et possidentis*. In all such cases the rule is, to leave the parties where it finds them, giving no relief and no countenance to claims of that character. 1 *Story's Equity*, 295, sec. 298. *Thompson vs. Thompson*, 7 *Vesey*, 470. This doctrine has been fully recognized and adopted by this Court, in *Howell, adm. vs. Fountain et al.*, 3 *Kelly's Rep.* 176. The question raised by the defendant's second ground of demurrer to the complainant's bill as amended, necessarily leads us

to inquire whether the complainant by his own allegations in his bill, clearly shows that he *actively* participated in the organization of the Planters' and Mechanics' Bank, as one of the stockholders thereof; and whether he was such stockholder, at the time the bills in controversy were issued by the bank? Was the bank organized by the stockholders in accordance with the provisions of the charter? Were the bills of the bank, from the payment of which the complainant seeks to be protected, issued according to the provisions of the charter?

To answer these several inquiries satisfactorily, we must refer to the charter of the bank, and to the statements and allegations contained in the complainant's bill.

By the second section of the charter incorporating the Planters' and Mechanics' Bank of Columbus, it is declared, "that the stock of the company shall consist of one million of dollars, in shares of one hundred dollars each, and *the stockholders in said bank, are hereby required to pay twenty-five per cent. on the amount of their capital stock, in specie, before the Board of Directors shall be permitted to issue their bank notes.*"

The charter of the bank then, it will be perceived, *imperatively* required that the stockholders should pay in the sum of two hundred and fifty thousand dollars *in specie*, before the company should be permitted to issue their bank notes.

By the 4th section of the charter it is declared, that "for the well ordering of the affairs of said corporation, there shall be seven directors, who shall be elected as soon as the sum of two hundred and fifty thousand dollars *in specie*, shall have been paid in by *the stockholders* of the bank, and the President, Directors, and Cashier, are hereby *expressly inhibited from the issuing of their bank notes, until they have officially and under oath, notified the Governor that the provisions of this charter have been literally and strictly complied with.*" Prince, 125-6.

This section of the charter demonstrates, in *unequivocal terms*, the meaning and intention of the Legislature, in regard to the organization of this bank.

It was the intention of the Legislature to protect the community against the evil consequences of a *depreciated paper currency*,

by expressly inhibiting the company from issuing their bank notes, until the provisions of the charter had been *literally and strictly complied with*. This charter was accepted by the stockholders in the *terms* which the Legislature enacted it, and they consequently are *bound by its provisions*. The complainant was one of the original corporators and stockholders in the Planters' and Mechanics' Bank. Now let us turn our attention to the statements and allegations contained in the complainant's bill, and see in what manner this bank was organized, and under what circumstances most of the bills, now the subject matter of controversy, were issued by the bank.

The complainant in the amendment to his bill, avers, that on the 30th December, 1836, he with others, accepted the charter, and that he subscribed for stock to the number of twelve hundred and sixty-four shares, and paid upon the same thirty-one thousand six hundred dollars, or twenty-five per cent.; that shortly after the organization of the bank, the complainant, with the other stockholders, held a meeting, when it was resolved, that in consequence of the derangement of the monetary system in the United States, it would be imprudent for the bank to make any issue of bills, and that the bank would not commence operations under the charter, but would for the present, *put out at interest, the capital paid in*; that in the beginning of the year 1838, a portion of the stockholders deemed it *advisable to call in their capital stock*, and commence business, and that Terry, Pope, and others, who owned thirty-six hundred and thirty-five shares of stock, being unable or unwilling to continue their investment in stock, transferred the same to the complainant, so that he might transfer it to such persons as might apply therefor, and that said shares were transferred by him, to Bailey, Banks, and others, before the bank issued any bills; except seventy-one shares, which complainant retained for himself, making him the owner, on the 8th day of February, 1838, of thirteen hundred and thirty-five shares of stock; prior to which day the bank had made no issue. In September, 1838, the complainant purchased forty shares of stock, and in January, 1839, he purchased fifty shares, making

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his aggregate number of shares of stock in the bank, on the 5th day of January, 1839, fourteen hundred and seventy-five shares. By reference to the declaration which is attached to the complainant's bill, and made a part thereof, it appears that most of the bills sued on, were issued by the bank in the year 1838, during the time the complainant was a stockholder, he having sold his stock as he alleges, in October, 1839.

The complainant then, was one of the *original* stockholders when the bank was organized; originally subscribed for twelve hundred and sixty-four shares of the stock; was the owner of thirteen hundred and thirty-five shares of stock on the 8th February, 1838, and on the 5th day of January, 1839, owned fourteen hundred and seventy-five shares of the stock of the Planters' and Mechanics' Bank of Columbus. In October, 1839, he sold, and transferred all his stock in the bank. From the 30th December, 1836, up to the 28th day of October, 1839, the complainant was a large stockholder in this banking company.

We have seen, that by a resolution of the stockholders, the capital stock of the bank paid in, was *put out at interest* shortly after its organization; but whether it was put out at interest in the hands of the stockholders or other persons, *this* record does not inform us. The complainant alleges that in the beginning of the year 1838, a *portion* of the stockholders deemed it *advisable* to call in their capital stock, and commence business; but it is not alleged that any portion of the stockholders *did in fact*, call in, and *actually pay in*, the capital stock of the bank, which had been by resolution, *put out at interest*. Deeming it *advisable* to call in the capital stock of a bank, which had been put out at interest by the stockholders thereof, is one thing—the *actual calling it in*, and *paying it in*, is another and quite a different thing, at least, so far as the bill-holders are concerned.

One of the counsel for the complainant states, that the omission to allege that the capital stock put out at interest, was *actually paid in*, was a mistake of the pleader. We have only to say, that if such be the cause of the omission, it is a most *fortunate* circumstance for the complainant, if the record in the case of *Lane vs. Thornton*, which has been argued in connexion with this case, *be true*.

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It appears from the testimony of Ragan, which is in the record of that case, that he was the Cashier of the bank in 1838, when it first commenced issuing bills; that the bank did not have but little specie on hand, or in its vault—not exceeding eight hundred or one thousand dollars; and that two hundred and eighty, or three hundred thousand dollars in bills, were issued by the bank in 1838. The facts, as disclosed by the record, in the case of *Lane vs. Thornton*, being *judicially* made known to us, and that case having been argued in connexion with this, has induced us to scrutinize the complainant's allegation in regard to *calling in the stock*, more closely than we otherwise should have done. With that record before us, we conclude that the omission of the complainant to state that the capital stock of the bank put out at interest was *actually paid in*, when the bank commenced issuing bills in 1838, was not a *mistake of the pleader*. The complainant shews by his bill, that the capital stock of the bank was *put out at interest* previous to the year 1838, but does not shew, that it was *returned to the bank* when most of the bills in controversy were issued during that year. The complainant has failed to shew *affirmatively*, that the provisions of the charter were complied with in that particular. When the bills were issued in 1838, he shews that the capital stock of the bank was *put out*, but has failed to shew that it was ever again *put into the bank*. We have thus far considered this question, as if the capital stock of the bank had been originally paid in by the stockholders, *in specie*, as required by the charter. Does the complainant shew that it was so paid in? So far from shewing that the capital stock of the bank was paid in by the stockholders *in specie*, the contrary is most clearly demonstrated. The complainant alleges in his amendment to his bill, that "*the books of subscription were opened in pursuance of the charter, and that he subscribed for stock in the bank to the number of twelve hundred and sixty-four shares, and paid upon the same the sum of thirty-one thousand six hundred dollars, or twenty-five per cent.*" By the second section of the charter, as we have already shewn, the stockholders were required to pay twenty-five per

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cent. on the amount of their capital stock *in specie*, before the company could issue their bank notes.

Although the complainant states that "the *books of subscription were opened* in pursuance of the charter," he does not allege that the thirty-one thousand six hundred dollars was paid by him *in specie*; or that *it was paid in pursuance of the charter*. The books of subscription may have been opened *in pursuance of the charter*, but it does not necessarily follow, that the complainant paid the twenty-five per cent. on the amount of his capital stock *in specie, in pursuance of the charter*.

If the twenty-five per cent. on the amount of the complainant's capital stock was in fact paid by him *in specie* in pursuance of the charter, why did he not so allege it? It was a most *material* averment for him to make, in order to invoke the aid of a Court of Equity to grant him the relief which he seeks.

Whether the thirty-one thousand six hundred dollars was paid in by the complainant in the bills of suspended banks, or in stock notes, *this record does not inform us*. In regard to the thirty-five hundred and sixty-four shares of the stock which was transferred to the complainant in the beginning of the year 1838, by Terry, Pope, and others, and by him re-transferred to Bailey, Banks, Perry and McDougald, there is no allegation *that any thing was ever paid into the bank on that stock*, either by the original subscribers, the complainant, or those to whom he transferred it, *at the time the company commenced issuing their bank notes, in 1838*; but the presumption is very strong, from what the complainant does allege, that *nothing was paid on that stock up to that time*.

The complainant states in the original portion of his bill, that that stock was not transferred with a view to any ownership thereof by him; *that he at no time made any payment therefor*, either in money, by note, or otherwise, or any *promise or contract for payment therefor*, except a premium of one dollar per share to S. A. Bailey, which was paid by direction of D. McDougald; that in the year 1838, it was concluded to *prosecute the enterprise*, and complainant was induced, for the benefit, and at the instance of others, to collect together other purchasers of said stock, and

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in so doing, procured it to be transferred to him, without his assuming any *liabilities therefor*, either to the bank or to any other person, except the payment to Bailey, as before stated.

Now, if Terry, Pope, and others, who were the original subscribers for the thirty-five hundred and sixty-four shares of stock, had paid in thereon, the twenty-five per cent. *in specie*, as required by the charter, it is not reasonable to conclude that they would have transferred their stock to the complainant without his *paying*, or at least *assuming a liability therefor*; which he expressly states *he did not do*. Nor does the complainant allege, that those to whom he transferred the stock *paid him* any thing for it, or that they *paid into the bank* any thing for the stock, *at the time* the complainant as a stockholder, and his transferees as stockholders, "*prosecuted the enterprise*" of issuing the bills of the bank, in 1838. But we are not left in doubt that the bank went into operation in 1838, and commenced issuing its bills in *open violation of its charter*; the statements of the complainant furnish the most *conclusive evidence* upon that point. Most of the bills sued on, it will be recollected, were issued by the bank in 1838, and that no bills were issued until the beginning of that year. On the third page of his original bill, the complainant alleges, "that *long prior* to said bills being issued and put in circulation by the said Planters' and Mechanics' Bank, the same was in a state of *failure* and *suspension*, and so known to be to the said Bank of Columbus, &c." On page nine of the original bill, the complainant further states, "that when the Planters' and Mechanics' Bank of Columbus went into operation, and commenced issues and discount, and the receipt of deposits, in February, 1838, it went into operation and commenced, and prosecuted its business as a *suspended* and *non-specie-paying* bank." The complainant, as it appears by his own shewing, was one of the original stockholders who *actively* contributed to put this banking company into operation—owned a large amount of the stock at the time most of the bills were issued, from the payment of which he now seeks relief as such stockholder. And so far from the stockholders in said banking company

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paying twenty-five per cent. on the amount of their capital stock *in specie*, before issuing their bank notes, as specially required by the charter, the bank, in the language of the complainant, "*long prior* to the bills being issued and put in circulation, was in a state of *failure* and *suspension*."

It is true, the complainant alleges in the amendment to his bill, that on the 28th day of October, 1839, when he *bona fide* sold out all his stock in said bank, it was *perfectly solvent*, having a *large surplus fund*. In what that large surplus fund consisted, we are not informed. It however required no prophetic vision to discover, that a bank organized as this was, without any *specie* basis for the redemption of its bills, could not long maintain its credit, when settlement day should arrive; especially, as when its bills were first issued and put in circulation, "*it was in a state of failure and suspension*." The consequences resulting from this illegal transaction, furnishes a melancholy portion of the history of our State, as those who *confidingly* exchanged their labor and produce for the bills of the bank, can bear ample testimony. It was urged on the argument, that the Act of 10th Dec. 1841, granted a *pardon* to all the banks in this State which had failed to redeem their liabilities in *specie*, which included the Planters' and Mechanics' Bank. Conceding that Act was intended to embrace such banks as went into operation in *open violation* of their charters; yet, the complainant very clearly shows, that this bank is not within its provisions, for the reason, it did not comply with the requisitions of the Act of 1841. That Act extended to such banks only, as should commence to redeem their liabilities on demand, *in specie*, by or before the 1st day of January, 1842, and shall *continue thereafter* to pay on demand, all their liabilities *in specie*. *Hotchkiss*, 363.

The complainant alleges in the amendment to his bill, "*that in March or April of 1841, the Planters' and Mechanics' Bank, and the Bank of Columbus, each failed to redeem their bills in specie; in consequence thereof, proceedings were instituted against both of said banks, for the forfeiture of their charters, and upon said proceedings, judgments of forfeiture were severally rendered, as will appear by the proceedings hereunto annexed,*

marked exhibit A and B." 'The Planters' and Mechanics' Bank did not accept the *terms of pardon* offered by the Legislature, by redeeming their liabilities on demand *in specie*; consequently, judicial proceedings were not arrested, and the charter was *forfeited* by the judgment of the Superior Court of Muscogee County. There is another fact apparent on the face of the complainant's bill, to which our attention was called on the argument. The stock account of the complainant, which he alleges was taken from the books of the bank, shows, that John E. Morgan, Wm. A. Redd, and Wm. Redd, sen. were the owners of three hundred shares each, of the capital stock of the Planters' and Mechanics' Bank.

The complainant, however, alleges, that although the stock appears on the books of the bank to have been owned by Morgan, Wm. A. Redd, and Wm. Redd, sen. yet he was in fact the owner thereof; although the same was transferred by him to them on the 27th March, 1838, it was done for the complainant's benefit. In view of the laws of the State, which required semi-annual returns to be made to the Governor of the names of all the stockholders, and the amount of stock owned by each, &c. for the information of the public, the names of solvent, responsible men, appearing as *stockholders* on the books of the bank, when in truth and in fact, they were *not such stockholders*, was eminently calculated to *mislead* and *deceive* the community in which the bills of the bank were circulated, to say the least of it. Persons knowing the Messrs. Redds and Morgan, who were represented to be the owners of *ninety thousand dollars* of the capital stock of the bank, may have taken the bills on *their* credit, when they would have been unwilling to have received them on the credit of the *unknown real owner*. When we take into view the *imperative* provisions of the charter of the Planters' and Mechanics' Bank, and the *principles* by which Courts of Equity are governed in granting relief to a party, against the consequences of his own *illegal* transactions; to state the *facts* of this case, as the same appear by the complainant's own showing, *is to decide it*. A Court of Equity will not interfere to as-

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sist him, but leave him to defend himself at Law, as best he can. Let the judgment of the Court below, overruling the demurrer to the relief sought by the complainant, be reversed.

No. 66.—W. T. COLQUITT and others, plaintiffs in error, vs. JOHN H. HOWARD, defendant in error.

- [1.] Persons owning lands as tenants in common, are incorporated for the purpose of selling the lands held in common, and making improvements thereon, and the charter is accepted: *Held*, that the title to the property vests in the corporation, and that one of the tenants cannot maintain a suit to enjoin a trespass on the same, and that the corporation alone can sue.
- [2.] *Held*, also, that one of the original tenants cannot maintain a suit to enjoin a breach of covenant entered into by a purchaser from the corporation, of portions of such land, with the corporation.
- [3.] Persons exercising the corporate powers of a corporation may, in their character as trustees, be held liable in a Court of Chancery, for a fraudulent breach of trust; and a stockholder, in a case where the directors collude with others who have made themselves liable by negligence or fraud, and refuse to prosecute; or when they are necessarily parties defendants, may file a bill on his account and in behalf of the other stockholders; in such a case, the corporation must be made a party defendant.

In Equity, in Muscogee Superior Court. Decision on demurrer, by Judge IVERSON, May Term, 1852.

The questions decided in this case, arose from a demurrer to the bill filed by John H. Howard. The material allegations in that bill were as follows:

In 1840, the Mayor and Council of Columbus were authorized by an Act of the Legislature, to define the limits of Bay street, and to lay off a portion of said street and of the North Common, into water lots, and to dispose of the same. The lots were laid off, thirty-six in number, and one-half of them, *viz*: the even numbers, 2, 4, 6, &c. were, by deed dated in 1841,

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conveyed by the City Council to John H. Howard and Joseph Echols. One of the covenants in this deed was, that Howard & Echols should "erect a suitable, sufficient and well-constructed dam across the Chattahoochee river, terminating on the eastern bank, at any point on or above lot No. 1, &c. and to construct and form a safe and well-constructed canal or race, extending from said dam through all the said lots; said dam to be so high, and said canal or race to be so capacious, that when said river falls to the lowest height at which it usually stands in very dry weather, all the water of said river may, as it runs down, pass through said canal or race, and keep said dam or race in good repair," the said lots and improvements, &c. to be liable for any damages which may arise from a failure to comply with this covenant.

In 1843, the City Council, by deed, conveyed all of the odd numbers of said lots (except No. 1,) to John H. Howard, individually, the deed containing the same covenant, with the former deed to Echols & Howard.

Immediately thereafter, Howard and Echols entered into an agreement, whereby Echols relinquished to Howard, his one-half interest in the lots first purchased, and in lieu thereof, accepted an interest of one-fourth in all the lots conveyed by both deeds. One undivided half of all the lots was afterwards sold to Farish Carter and John B. Baird, and one undivided fourth retained by Howard & Echols, each; Echols' portion being conveyed to one Jeter, as trustee for Echols—the truth being, as complainant believed, that Walter T. Colquitt, through Jeter, advanced the money necessary to carry on Echols' share of this work, and the title to the property remained in Jeter for the security of Colquitt; Echols all the while controlling and directing the work.

In 1845, Jeter, Carter, Baird and Howard, were incorporated by an Act of the Legislature, under the style of the "Water Lot Company of the City of Columbus." This charter, in a preamble, stated the history and condition of the Company, and then, "in order to enable the said Howard and his associates, owners of said water lots, to conduct their affairs, and to carry

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on their operations with greater facility," enacted, that they be incorporated under the style aforesaid, and be "capable in law, to have, hold, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, &c. of whatsoever nature, kind or quality, the same may be, and the same to sell, grant, &c." together with the usual corporate powers of suing, having a seal, &c.

The 2nd section of the charter provided for a President and Board of Directors, and provided that "the death of one or more of the Directors or parties in interest, shall at no time, or in any case, prevent or hinder or delay a sale or sales of the said lots, or any of them, or an interest therein, by the survivors in the name of the corporation."

The 3d section conferred power on the President to make certain contracts, "not appertaining to real estate, or an interest therein."

The 4th section provided a mode for the authentication of the contracts of the corporation.

The 5th section imposes an individual liability upon the stockholders, and limited the indebtedness of the company to one-half its capital stock.

Section 6 was the usual repealing clause.

On 16th February, 1847, the Water Lot Company conveyed to Wm. Brooks, lot No. 15, also a lot of land adjoining the race, in which deed it was covenanted, that Brooks, his heirs and assigns should be confined and restricted to the privilege of erecting and running a saw mill, or saw mills, on said piece of land, and should use only the water allowed to lot No. 15. Subsequently, Brooks and one John G. Winter, (who was equally interested in the purchase,) in violation of this covenant, erected on the said piece of ground, a large wooden building, three stories and a half high, in which, in addition to their saw mill, they placed in operation a large quantity of machinery, viz: turning lathes, machinery for making buckets, pails, &c. &c. &c. To arrest this violation of the covenant, the Water Lot Company filed a bill to enjoin them from farther prosecuting this work, known as the "Variety Works." The injunction was refused

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by the Circuit Judge, and upon a writ of error this judgment was affirmed in the Supreme Court, on the ground that an adequate remedy at Law was open to the company, and on account of the delay in filing the bill until the work had been completed. Since that decision, suits at Law have been commenced for a breach of this covenant, which suits are still pending. Nevertheless, Brooks & Winter, emboldened by the decision of the Court, immediately commenced to make and erect another large building, adjoining the one already erected, not with a view to use it as a saw mill, but in execution of their previous purposes in violation of their covenant. The bill charged, that this building being filled with combustible material, was a nuisance, and that Winter & Brooks had also erected a kiln or brickhouse, near the race or canal, and upon one of the lots belonging to the Water Lot Company, in which lumber was placed to dry, which kiln was also a nuisance, exposing to the danger of fire all the surrounding buildings.

The bill farther charged, that the Water Lot Company commenced an action of ejectment against Stephen M. Ingersoll and Wm. Ingersoll, to recover so much of all of said water lots as lies west of the middle of the main channel of the river; and also an action on the case for the waste of water from the dam on the west side of said river, which suits were still pending.

In 1850, Carter, Baird, Colquitt, and one Richard P. Spencer, purchased each from Brooks & Winter, one-fifth interest in the "Variety Works;" and also in a large quantity of lands lying on the Alabama side of the river and bounded on the east by the western lines of the said water lots, which was the land owned by Ingersoll, (and in virtue of which he claimed to the middle of the main channel of the river,) and sold by him to Brooks & Winter. In virtue of this purchase, Colquitt and his associates were to protect Ingersoll from Howard's interest, the suits by the Water Lot Company against Ingersoll, and the suits brought against Brooks & Winter were agreed to be settled without regard to complainant's rights or wishes. Farish Carter, in the mean time, transferred all of his interest in the Water Lot Company, to his two sons, Samuel N. and Benjamin F.

Carter, who made to Walter T. Colquitt a power of attorney to act for them.

In March or April, 1851, the western wall of the canal erected by the Water Lot Company, was broken by the flood arising from the heavy rains at that time. The parties in interest held a meeting and agreed that the wall should be repaired, and an agent appointed to superintend its erection. Complainant supposed the repairs were going on, when he learned that the repairs of the wall had been abandoned, and that Baird, and Colquitt acting for himself and as attorney for the Carters, assuming to be the Water Lot Company, together with Brooks and Spencer, the Howard Manufacturing Company, and the Eagle Manufacturing Company, (the two latter having purchased one nineteenth of the water power controlled by said canal, and having erected factories adjacent thereto,) contrary to the wishes of Howard, and without any order or resolution of the Water Lot Company, are now erecting a dam west of said canal wall, commencing at the west side of said wall, near its lower terminus, and running in a north-west direction at an angle of about 30 degrees from said western wall, until it reaches the dam running across the river—the effects of raising which dam would be, to render the repair of the western wall of the canal very expensive and troublesome, and to overflow a large portion of water lots, one-fourth of which belongs to complainant; to take away all power of shutting out the water from the canal; to injure and impair the value of the unsold lots, and in time of a flood would occasion a much greater quantity of trees and drift-wood to be deposited in said canal, to the damage of the whole property, and endangering the eastern wall of the canal. Another effect would be, to furnish those persons who have purchased lots increased water privileges without any compensation to the Water Lot Company, and to the injury of complainant's interest in the unsold water powers and privileges; and also, to furnish the proprietors of the Variety Works increased facilities for floating logs through the canal, and also increased water power to such an unlimited extent as would forever protect the Variety Works from suits by the other companies for using more water power than, by their covenant, they were allowed to

use. In the deeds conveying lots to the Howard and Eagle factories, the proprietors thereof covenant to bear their proportionate share of the expense of keeping up the walls of said canal. If the new dam is built, the bill charges that these proprietors will be relieved from this covenant.

The bill alleged that complainant has been the President of the Water Lot Company, ever since its organization under its charter; that he never assented to any of these acts, nor has the Company regularly acted, as he believes; that Echols agreed with complainant in his views and wishes, and he understands that Brooks did not consent to the acts of Colquitt.

The bill alleges that the injury will be irreparable, from the uncertainty of the damages, and from the inability to measure it in dollars and cents.

The prayer of the bill, that "an injunction be directed to the said defendants, requiring and enjoining said Brooks, Spencer, Colquitt, Baird, Samuel M. and Benjamin F. Carter, from permitting the said additional wooden buildings on said piece of ground so conveyed to Brooks, to remain on said piece of ground, and from permitting said machines or machinery, (other than a saw mill or saw mills,) to be run or kept in operation in said additional building, or to remain in the same; and also requiring and enjoining them from permitting said kiln or brickhouse to be used for the purpose for which it was erected; and from erecting it or any other upon any of said lots or ground, and from permitting said kiln or brickhouse to remain on any of said ground; and also restraining and enjoining the Howard Manufacturing Company, the Eagle Manufacturing Company, Colquitt, Baird, Brooks, Spencer, Samuel M. and Benjamin F. Carter, and Echols, from the erection of said contemplated dam, or any other west of the said canal," and further enjoining the co-corporators of complainant, from doing any act in the name of the Water Lot Company, affecting the interest of complainant in this property, and also from arresting, or attempting to arrest or delay the suits against Winter & Brooks and Ingersoll, and for general relief.

To this bill a demurrer was filed, among other grounds,

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1st. For multifariousness.

2d. That Howard was not the proper party complainant, and could not maintain this bill—the injuries complained of being against the Water Lot Company.

Many other questions were brought up by the writ of error, but the above alone, were decided in this Court.

The Court below overruled the demurrer. That decision is brought up for review.

MOSES, for plaintiff in error.

BENNING and W. DOUGHERTY, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

We have no doubt but that this bill was demurrable for multifariousness. We do not favor this ground of demurrer, but there are cases in which the principles of justice require it to be sustained. This is one of them, as we think, easily demonstrable. But inasmuch as the bill must go out of Court upon a ground of demurrer vitally effecting its legal merits, I shall confine the discussion to that ground.

[1.] According to the view which we have taken of this cause, the complainant, Major Howard, has no right to sue as he has brought this suit, in his individual character. The demurrer makes the question whether he has or not, for it asserts that "Howard was not the proper party complainant, and could not maintain this bill, the injuries complained of being against the *Water Lot Company*." The complainant represents himself as having an interest in certain water lots, originally purchased by himself and one Josephus Echols, of the City of Columbus. In the deed from the City of Columbus to them, they covenant to erect a dam across the river, and to construct a canal on the line of the lots, so capacious as to receive all the water of the stream at low water, and to keep it in good repair; and that the lots and the improvements thereon, and no other property whatever, should be liable for the damage which might grow out of

a breach. He and Echols being at first proprietors of the whole, sold one-half of the property to Carter and Baird, he retaining one-fourth interest, and Echols the remaining one-fourth interest. He represents that himself and his co-tenants, were incorporated under the name and style of the *Water Lot Company of the City of Columbus*, for the purpose of more effectually carrying out their views in the sale of the property, constructing water-works, &c. That the Company was organized under the charter, and he, himself, elected President, and that he continues to hold the office of President to the present time. The bill farther charges, that the *Water Lot Company* sold to the defendant, Brooks, one of the lots belonging to them, and that the defendant, John G. Winter, was equally interested with him in the purchase; that Brooks covenanted with the company that this lot, and the water privileges connected with it, should be used alone for the purpose of a saw mill or saw mills, and contrary to the covenant, they had erected a large house thereon, and were engaged in the manufacture of various articles, such as buckets, pails, &c. &c. requiring a great deal of machinery, and the accumulation of lumber and other combustible material; that after a fruitless attempt by the *Water Lot Company* to enjoin them from such use of the land so bought by them, they had sold to Colquitt, Baird and Spencer, an interest in their manufactory; and that these proprietors, contrary to the original covenant, were proceeding to erect another large building for the purpose of conducting the said manufacture of the various articles aforesaid. Of the erection and proposed use of this building, Howard makes complaint; charges that it is in violation of the covenant—that it will increase the risk by fire, of the property of the company, in which he has an interest, and prays that they be enjoined and restrained from the erection and use of the building for any purpose, save that of a saw mill.

He charges also, that these defendants had erected a kiln for drying lumber, on the line of the canal, upon property belonging to the *Water Lot Company*, so near to the other property of the company, in which he is interested, as greatly to subject it to

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the danger of loss or destruction by fire, and prays that the use of this *kiln* may be enjoined, as being a nuisance.

The complainant farther charges, that the proprietors of the Variety Works, Brooks, Winter, Colquitt, and others, assuming to act as the Water Lot Company, but without authority from the company, and against the wishes of the complainant; together with the Eagle and Howard Manufacturing Company, the original dam and canal being broken by a flood in the river, were proceeding to construct a new dam and to open a new canal or race, for the purpose of affording the required supply of water to the different proprietors; that this new dam will cause the unsold lots of the company to be overflowed, increase the expense of keeping up a canal according to his original covenant with the City; will endanger the eastern line of the present canal; increase the supply of water to which the proprietors of the Variety Works are entitled by their contract with the company; and will release the obligation which the two manufacturing companies came under to pay their relative proportions of the expense of keeping up the canal. He charges that all of this is in violation of his rights, as the owner of one-fourth of the property of the Water Lot Company, and prays that they may be enjoined and restrained from the farther construction of this dam. All these several trespasses, he charges, are not capable of redress at Law; that the damages to him cannot be ascertained by proof, and will be irreparable. This statement covers the material parts of the bill. A large amount of matter, out of which grew some important questions, is intentionally omitted, as being irrelevant to the question upon which the decision is made.

[2.] Without saying whether the bill makes a case where Equity will interfere or not, we are clear, that for the injuries complained of, the *Water Lot Company* alone can sue. There are three distinct grounds of complaint in the bill, to wit: the erection of the building by Brooks, Winter and others, with a view to manufacturing purposes, the *kiln* for drying lumber, and the construction of a *new dam* across the *Chattahoochee*. All these are charged to be to the damage of the complainant, Howard.

He, in his personal character, asks relief by injunction. He is the sole party complainant, and he grounds his right to relief upon his ownership of the one-fourth part of the unsold water lots. So far as relief against the proprietors of the manufacturing establishment is sought, upon the score of a violation of their covenant, the complainant has no standing in Court, because they made no covenant with him, whatever. Their undertaking was to the *Water Lot Company*—with that Company, and not with *Major Howard*, did they stipulate to use the lot which they purchased, alone for the purposes of a saw mill. There is, therefore, no privity between them and the complainant, and without that he is not entitled to sue. The same things may be said of the case, so far as the relief against the erection of the new dam depends upon the alleged release of the Eagle and Howard Manufacturing Companies from their obligation to pay their proportionable part of the expense of keeping the canal in good repair. That obligation was assumed, not to *Howard*, but to the *Water Lot Company*. But the proposition which covers the whole case is this: by accepting the act of incorporation, the title to these *water lots* vested in the corporation; Major Howard's title to the one-fourth as tenant in common, was of course divested; and these things being so, no person can sue for the injuries done or anticipated, but the corporation. That the *Water Lot Company* can sue for these trespasses, there is no doubt. *Angel and Ames on Corporations*, 312. *Com. Dig. title Franchise*, (1 Kyd. 187.) Whether Equity would grant relief, would depend upon the case made. The Act was passed in 1845, and, it would seem, at the instance of the complainant and the other original purchasers of these lots. They are named in the Act, and are declared to be a body corporate, by the name and style of the *Water Lot Company* of the City of Columbus. They are clothed with the attributes of a corporation, such as the right to sue and be sued, the use of a common seal, succession, &c. &c. The bill shows that these persons (the complainant and his associates) accepted the charter. They accepted it by the election of officers, (Howard himself being elected President of the

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Company,) by executing contracts and making deeds, and instituting suits in the corporate name.

And by accepting the charter, they assumed the obligations and became entitled to the privileges which it creates. They came under all the disabilities which it imposes, one of which, as I expect to show, is incapacity to sue for injuries to these lots in their individual characters. *Angel & Ames, on Corporations*, 51, '3, '4. 1 *Greenleaf's Me. R.* 79. 3 *T. R.* 240. 1 *Ibid.*, 589. 3 *Barrow*, 1656. 2 *Dow & Clark*, 21. 7 *Bing.* 1. 7 *Dow & R.* 267. 4 *Barn. & C.* 781. *Acts of 1845*, 123.

The preamble of the Act of 1845, recites the Act of the Legislature authorizing the City of Columbus to define *Bay street*, and to lay off *water lots* on its western boundary, and to sell the same. It states, that John H. Howard and others, had become purchasers of these water lots, and refers to the improvements, to wit: the dam and canal, which they had covenanted to make; and proceeds to declare, in order to enable the said Howard and his associates, owners of said water lots, to conduct their affairs and carry on their operations with greater facility, Be it enacted, &c. &c.

The Act gives to the corporation unlimited power to buy, sell and hold, real estate. An exceedingly unwise grant, in my poor judgment. It constitutes the parties in interest in the water lots, a *Board of Directors*, with power to appoint officers and to sell the lots, and prescribes the manner of executing titles to the same. From all of which it is perfectly plain, that the proprietors of these water lots were created into a *corporation*, for the purpose of more easily vending and improving the water lots which they held in common. These lots were the only capital stock of the company. The interest which they held in them, became the value of the shares of each corporator. No provision is made for any other stock. It is a private civil corporation, based upon the water lots as its primary capital stock. The first object of the corporation, unquestionably was the *sale* of the water lots. Now under all these enactments, under the charter and objects of this incorporation, who can doubt for a

single moment, but that when the charter was accepted, the title to the lots vested by operation of law, in the corporation, and that the original proprietors, instead of holding title as tenants in common, became the owners of an interest (call it stock if you please) in the entire capital, measured by the quantum of their interest originally in the lots. This was necessary to make the franchise at all available—this was indispensable to accomplish the object which the corporators had in view—for how could the corporation sell these lots without a title? Who would buy from them? Acting upon this view of the matter, we find that after the charter was accepted, all the sales were made by the corporation. Clearly, the title could not be in the original proprietors and in the corporation at one and the same time. A charter cannot be accepted partially, or conditionally, or for a limited time. If it is received but for an hour, it is conclusive and obligatory. *Angel & Ames*, 55. 4 M. & S. 255.

Resisting the idea that the title vested in the corporation, counsel rely upon the text of *Angel & Ames* to the effect, that the mere incorporation of tenants in common, does not vest the title, but a conveyance must be made by the individuals to the corporation. This is an incontrovertible proposition. But it contemplates a very different case from that before us. If a company of gentlemen are tenants in common of a body of land, and are incorporated for a definite object—as manufacturing, for example—the mere act of incorporation does not vest the title in the corporation, no more than it would vest the title of any one of them to his mansion-house. But if these tenants in common are incorporated for the very purpose of vending the land held in common, which is the very case in hand, I apprehend the result would be very different. The text of *Angell & Ames* is supported by the case of *Liffingwell vs. Elliot*, in 8 Pick. 455. Upon looking into that case, I find that several persons were tenants in common of seventy-five acres of land, and whilst so tenants, used it for the purposes of a manufacturing establishment. Afterwards, they were incorporated by Act of the Legislature. The Act makes no allusion to the land, but merely authorizes the company to hold real estate. The corporation was

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organized agreeably to the Statutes of Massachusetts, regulating manufacturing companies; and the corporate stock was divided into a certain number of shares. The *Supreme Court of Massachusetts*, under these circumstances, held that the mere incorporation of the tenants in common, to enable them to carry on more conveniently a common object, does not vest in the corporation a title to the land which they had previously used for the same purpose. That Court could have made no other decision. How different is this case?

Having established, as I must think conclusively, that the title to these lots vested by the charter and its acceptance, in the corporation, it needs no argument to show that it alone can sue for injuries to the corporate property. If the corporation alone can sue, then Major Howard has no right to sue, and must go hence, without his cost.

It will be remembered that the complainant, Howard, covenanted with the City of Columbus, to build and keep in good order, a dam across the river Chattahoochee, and a canal of certain capacity described in the deed from the City to him and Echols, for these water lots. It will also be remembered, that he charges in his bill that the construction of the new dam will greatly damage the canal, and thus visit him with liability on his covenant. It might be claimed from these facts, that upon the score of his liability upon his covenant to the City, even if the title to these lots does vest in the corporation, he is entitled to bring this bill. In looking into the covenant we find, that by express stipulation, the lots themselves, and the improvements put upon them, and no other property whatever, are made liable for any damage that may result from a breach of it. This being the case, he is not personally chargeable on his covenant, and the property is chargeable in the hands of the corporation. He, therefore, on the ground of the covenant, has no right to sue, and the corporation on that ground, has the right.

Again, the bill charges that Colquitt and his associates, assuming to act as the *Water Lot Company*, but without authority from the company and against the wishes of the complainant, are proceeding to construct the dam, which will damage him in the

particulars before stated. It may be said that from this allegation it is inferable, that the pleader designed to charge these defendants, as *directors of the Water Lot Company*, with a fraudulent management of the affairs, and to restrain them from so doing farther. If, however, such was his purpose, which we do not believe, he has signally failed to make such a case as would give a Court of Chancery jurisdiction.

[3.] It is proper here to say, that whilst corporations are amenable to the Courts generally, according to the course of the Common Law, for the misuser or nonuser of their franchises, yet it is true, that the persons who are in the exercise of the corporate powers, may, in their character as trustees, be accountable to a Court of Chancery for a fraudulent breach of trust. If then, the directors of this, or any corporation, should refuse to prosecute, by collusion with those who had made themselves answerable by negligence or fraud, or if the corporation is still under the control of those who must be made defendants in the suit, the stockholders (or any one of them for himself and the others) who are the real parties in interest, may file a bill in their own names. In such a case, the averments in the bill should clearly and distinctly give jurisdiction, for Equity interferes with great caution with the Common Law jurisdiction over corporations. In such a bill, the corporation must be made a party defendant. Such a case as would give jurisdiction is not made in this bill; indeed as before stated, is not attempted to be made. *Attorney General vs. The Utica Insurance Company*, 2 Johnson's Ch. R. 389. *Robinson vs. Smith*, 3 Paige R. 222. *Ogden vs. Kip*, 6 Johns. Ch. R. 160. 3 Atk. R. 400. *Wood's Inst. B. 1 Ch. 8 p. 110.* 11 Coke R. 986. *Hichens vs. Congrove*, 5 Rup. R. 562. *Angell & Ames on Corp.* 251, 252.

Let the judgment be reversed.

No. 67.—ANN E. McDUGALD *et al.* plaintiffs in error, vs. WM. DOUGHERTY, defendant in error.

THE SAME vs. THE SAME.

- [1.] A bill filed by a creditor to compel the execution of a trust, is not a bill of *quia timet*, nor does it partake of the nature of such a proceeding.
- [2.] Where a *trust* has been created for the benefit of creditors, it is the right of any one of the creditors to sue in behalf of himself and the rest, to enforce the execution of the trust for the benefit of all who are interested.
- [3.] Proceedings before a Master in Chancery, are in the nature of an informal bill in Equity; and supervisory Courts will not interfere to correct their errors, unless substantial defects exist.
- [4.] If any great right or public policy has been violated by the Master, relief will be afforded; otherwise not.
- [5.] This *extra-judicial* mode of investigation is of great advantage, by relieving a Court of Chancery from the performance of burthensome duties, and enabling it to exercise its regular jurisdiction in a much more beneficial manner.
- [6.] A tender, to be a bar, should be made by the *debtor* or his legal representative, and not by a *stranger*.
- [7.] Notwithstanding a bill is filed by a creditor at the instance of himself and all others who may wish to come in, still up to the time of the decree it is a suit only between party and party.
- [8.] The plaintiff up to the time of decree, may make any disposition of the case, which he sees fit; and the defendant who is the debtor may tender satisfaction and compel him to accept it.
- [9.] When titles to property are disputed before a Court of Chancery, a Jury alone is competent to determine the real truth of the fact.
- [10.] Neither the Chancellor himself nor the Master, will undertake to decide upon antagonistic claims to property.
- [11.] The duty of a Master in Chancery is mainly to investigate accounts and audit them; and for the purpose of facilitating their inquiries and rendering them more effectual, they are empowered to examine witnesses and even parties to the cause.
- [12.] Interrogatories to a party before the Master, are in the nature of interrogatories in a bill of Chancery, and the answers are evidence to the same extent.
- [13.] According to the practice in England, and such is the correct practice here, a *party* interrogated before a Master in Chancery, has the right to demand that the questions be propounded in writing; otherwise as to

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witnesses. The party may waive this privilege and submit to a *viva voce* examination, and it will be good.

- [14.] If one general exception is taken to the Master's certificate, approving of interrogatories, and the Court is of the opinion that one only of the interrogatories ought not to have been approved of, the exception will be allowed. But if the exception is, that the Master ought not to have allowed of *any*, then if *one* was proper to be allowed, the general exception fails as to all.
- [15.] New parties may be introduced in the record by way of amendment to the bill, even at the hearing; and it is utterly immaterial whether they are made plaintiffs or defendants.
- [16.] Material amendments to sworn bills should be verified.
- [17.] Every *amendment* is an *indulgence* granted by the Court; and is granted to the mistake of the parties and with a view to save expense.
- [18.] When amendments are allowed, it should be upon such terms as not to injure others.
- [19.] If the new matter will affect the opposite party prejudicially, it should not have relation back to the time of filing the original bill; but the suit should be considered as pending only from the time of the amendment.
- [20.] A party will not be prejudiced by the recitals in a deed, executed under judicial compulsion.

In Equity, in Muscogee Superior Court. Decisions by Judge IVERSON, at Chambers, 1852. Consolidated by consent.

Wm. Dougherty filed a bill in behalf of himself and such other creditors of Daniel McDougald as might come in and be made parties, against Seaborn Jones, Alexander McDougald, Duncan McDougald, and Ann E. McDougald, charging that on 25th August, 1846, Daniel McDougald made an assignment of property amounting to \$250,000, or some such sum, consisting of lands, negroes, choses in action, &c. to Seaborn Jones and Robert B. Alexander, (since deceased,) *in trust* for the benefit of all his creditors who should come in within six months and file a full release with the said trustees; that Jones and Alexander, regardless of their duties as trustees, had wholly failed to execute the trust, but on the contrary permitted McDougald, until his death, (in September, 1849,) to use and control the property; to sell the same at pleasure and to receive the rents, issues and profits thereof; keeping also the title deeds, no de-

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mand for them or the property being made by the trustees ; that since the death of McDougald, the trustees have been equally negligent, permitting the property to go into the possession of Ann E., Duncan, and Alexander McDougald, who have received the rents, issues, &c. with full knowledge of the trust ; that Jones is much involved in his private matters by judgments and mortgages ; that he claims title to a portion of the property adverse to the interest of the creditors, and claims himself to be a creditor to a large amount ; that the trust property was much exposed, unprotected, wasted and scattered, and required the immediate interference of the Court.

The prayer of the bill was, for the appointment of a receiver and an account, &c.

On the 9th day of April, the Honorable *Alfred Iverson*, Judge of the Superior Court of the Chattahoochee Circuit, made an order at his chambers in said case, wherein, after making certain recitals, he ordered and directed, amongst other things, that A. S. Rutherford be appointed a receiver of the property and other things, mentioned in said alleged deed, under certain conditions in said order prescribed, and that the said Seaborn Jones, Ann E. McDougald, Alexander McDougald and Duncan McDougald, each should appear before him, the said Judge, on the second Monday of May, 1851, to discover and to deliver over on oath to said receiver, all the property, money, notes, executions mentioned in the said assignment, in their possession or control, or that of either of them, and the title deeds thereto, and all books, papers, memoranda, or evidences appertaining or referring thereto, or connected therewith, and also all the rents, issues, profits, proceeds, income, and receipts thereof, that had come into their possession, knowledge or control, at any time since the execution of said alleged deed ; and further, that the appointment therein made of the said receiver, was not in any manner to suspend or interfere with the duties, rights and responsibilities of said trustee, until the said receiver should be duly qualified, and said property delivered up to him as contemplated by the then order.

The plaintiff afterwards, to wit, on the 20th day of Novem-

ber, 1851, obtained from the Judge a supplemental order in said case, by which the Judge, after making certain recitals, ordered amongst other things, that Seaborn Jones, Ann E. McDougald, Duncan McDougald, and Alexander McDougald aforesaid, should each appear before him on Saturday, the 29th day of that same month of November, to discover on oath, deliver up, and pay over to said receiver, and execute proper conveyances for the same, the property, notes, *fi. fas.* and effects mentioned and specified in the deed of assignment made by Daniel McDougald to said Jones and Robert B. Alexander, and set forth in the bill of complainant, which may be in their knowledge, custody or control, with all papers, memoranda or title deeds, or evidences of title to, or connected with the same, and also, all the rents, issues, profits, proceeds and increase accruing or arising from said property, that might have been received by either of them, or by any other person for them, or subject to their control, since the execution of said assignment, and that defendants should be served with a copy of that and the previous order aforesaid, at least three days before the said 29th day of that said month of November, 1851.

The hearing of the answers to these orders was postponed from time to time, to suit the convenience of both parties.

On the first Saturday in January, the defendants appeared before his Honor, and it appearing that the said Ann E. was still sick and unable to attend to business, and also, that there was not then sufficient time for a full hearing on said matters, to be heard on that day, the hearing was further postponed by the Judge, as to the defendants Ann E., Duncan and Seaborn, viz: until the 12th day of January, 1852, but the said Alexander then and there submitted to an oral examination touching said orders, by said plaintiff, and was, after such examination, discharged by the Court from such orders.

On the 12th day of January, 1852, Duncan McDougald appeared before his Honor and submitted in writing his answer and showing to the orders aforesaid. As to Jones, he was ordered to make some further answers in some matters of no great consequence in said case, by a certain day, viz: the 3d day of February,

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1852, and also then to execute a deed to the receiver for the trust property.

On the 6th day of February, 1852, the said Duncan and Alexander filed their joint answers to the bill of complaint of said Dougherty.

Immediately before the filing of the answers of the said Alexander and Duncan to said bill, the said Ann E. came in open Court by her counsel, Henry L. Benning, and tendered to the plaintiff, thirteen hundred dollars in payment of his judgment and *fi. fa.* mentioned in his said bill, and all costs of every kind, and requested the plaintiff to accept the same, which he then and there refused to do; and thereupon, and on the filing of said answer, the defendants requested the Judge to discharge said answer, and the Judge refused to do it, and thereupon defendants excepted.

The following is an abstract of the answers of defendants to the bill and orders.

Seaborn Jones, in his answer to the bill, stated, that about 24th August, 1846, at the request of Daniel McDougald, defendant signed his name to a deed of trust for the benefit of McDougald's creditors, consenting to act as trustee therein. McDougald then took the deed and carried it away, and defendant has never seen it since. McDougald did not deliver the deed to defendant, nor did defendant read it over, nor did any witness attest his signature, nor did he see Alexander (the other trustee) sign it; that McDougald never delivered to him any of the property contained in the deed, but remained all the while in the possession of the same; nor did any creditor ever signify to defendant, his assent to, or acceptance of the provisions of the deed, nor did any creditor file his release as provided in the deed, within the six months specified by the deed. Defendant consequently never made any demand of McDougald for the property, *chose in action, &c.* conveyed by the deed; that after the death of McDougald, defendant and Alexander determined to attempt the execution of the trust, but after diligent search, could not discover the deed, and from information, concluded that the same had been destroyed by McDougald; that after the death of Al-

exander, defendant determined to attempt the execution of the trust, and advertised for sale the land lying in Alabama; that finding that many of the lots were claimed by others, he applied to the brothers of McDougald for the title papers, &c.; that subsequently, a small trunk and key had been delivered to him, but this bill having been filed, he had not examined the contents of the trunk; which trunk and papers are all the effects of McDougald in his hands; that hearing that an administrator appointed in Alabama, was proceeding to sell some of the land, he had filed a bill as trustee enjoining the sale. He denies making any agreement or arrangement with McDougald during his life, or the defendant since his death, giving control of the property, he never having had any possession or control of the same. He has heard, and believes, that McDougald did sell a part of the property, and collected some of the notes, and paid off with the proceeds a portion of his debts. Defendant denied that he was insolvent, and explained the fact of the mortgage and judgments remaining open against him.

The joint answer of *Duncan and Alexander McDougald* to the bill denied, that in their belief, any such deed of assignment had ever been made. They believe that such a paper was drawn and signed, but that it never was delivered or intended to be, but was retained by Daniel McDougald, and destroyed by him; that he never parted with the possession or control of his property, but exercised the same control down to his death, the creditors acquiescing therein—no creditor having at any time notified the said trustees of their acceptance of the provisions of the deed. The answer stated various acts of the complainant's assignor (he being assignee of a *fi. fa. vs. McDougald*) and other creditors, showing that they were not disposed to accept of the provisions of the deed. After answering all of the other allegations in the bill defendants stated that Ann E. McDougald had tendered, and was ready at any time to pay the complainant, Wm. Dougherty, the full amount of his *fi. fa.* To this answer was annexed as an exhibit, an exemplification of the returns of Ann E. McDougald as the administratrix of Daniel McDougald, deceased, which the answer stated was correct.

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The answer of Ann E. McDougald to the bill, affirmed the statements in the other answer, as far as the same came within her knowledge or belief. She admitted that as administratrix, there were assets in her hands sufficient to pay the complainant (Dougherty's) debt, and stated that she had tendered the full amount thereof to him, and was ready at any time to pay him, and tendered the same in her answer.

The answer farther stated that a debt on Tomlinson Fort (named in the deed of assignment) was compromised by Daniel McDougald in his lifetime, at about fifty cents in the dollar; that after his death a tract of land belonging to the intestate, was much desired by a purchaser who desired title immediately, and was willing to pay \$10,000 (a large price) therefor; that upon consultation with legal friends, she was advised that, as the purchaser would not await the slow process of administrator's sale, it would be best for her and the estate of intestate, to have the land levied on under an old *fi. fa.* outstanding, and sold to perfect titles; that the Mechanics' Bank of Augusta, held one of the oldest *fi. fas.* but refused to have it levied unless the bank was first satisfied in full; that anxious not to lose so favorable a sale of the land, she received from I. L. Harris, Esq. \$5,000, collected on the Fort debt, and placed it in the hands of her brother, Judge Alexander, to pay up the debt to the Mechanics' Bank, and procure the use of the *fi. fa.* which was accordingly done. The sale of the land, however, was arrested by complainant, to the great injury of the estate, in the opinion of respondent.

In answer to the order of 9th April, Seaborn Jones reiterated the statements made in his answer.

Duncan McDougald, in answer to these orders, stated what portions of the property named in the trust deed were in his possession, and stated the sources of his title thereto, denying that any portion thereof belonged to Daniel McDougald, or that any (except one negro) had been purchased from him since the date of the trust deed.

Upon the coming in of these several answers, the defendants, Jones, Alexander and Duncan, insisted that these answers were

sufficient to prevent the execution of the said orders. The Court held otherwise, and defendants excepted.

The plaintiff then proposed to propound written interrogatories to defendants, Jones and Duncan McDougald, in reference to certain matters contained in the orders. To which defendants objected, and being allowed by the Court, defendants excepted.

And thereupon the complainant propounded the following interrogatories to the said Duncan, viz :

To Duncan McDougald :

1st. When, and of whom did you purchase the lots E. 23, 17, 30, N. 27, 17, 30, N. 28, 17, 30, N. 26, 17, 30, and fraction 24, 17, 30. Did you purchase them all at the same time, and in the same purchase, and of the same person, and what did you agree to give for the same?

2d. How, and in what manner was the purchase money paid, in money, notes, other property, or what, to whom paid, and when paid?

3d. What sort of a conveyance or writing was executed to you for said land at the time of purchase, or at the time of payment of the purchase money, or any time since, who wrote it, and who were the witnesses?

4th. Did you ever have in your possession or see the patents of said land, and to whom were they issued, and when issued, and where are they? Did you ever have your title papers to said land recorded, if so, in what office? Have you established them or made any effort to do so?

5th. Who occupied and owned said land before you went on the same?

6th. How long have you resided in Georgia, and in what County, before you moved on said land, and who owned the place you lived on before you moved to the land above spoken of, and who sold it? How many negroes were on the place in Harris or Muscogee County, from which you moved to the land in question, and to whom did they belong? How many negroes were on the land of Daniel McDougald, when you came to reside there from North Carolina? How many mules or horses,

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cows, hogs, wagons, and carts, were on the place or plantation of Daniel McDougald, which you left when you moved on the said land in Alabama, and what became of the negroes, mules, stock, plantation tools, &c. ? When you left did they remain there, or were they removed or taken off about the time you left, and where were they removed to ?

7th. How many negroes did you own and bring with you from North Carolina ; name them and their increase ? How many of the negroes that were on the place or plantation of Daniel McDougald in Harris or Muscogee County, when you came to reside there, and about the time you left for Alabama, which are now in your possession, who superintended and directed said plantation in Alabama after you moved to the Watson place, and up to the time of the death of Daniel McDougald ? Was it not under Daniel McDougald's management and direction, principally ? Who sold the cotton made on the place, from its settlement up to the death of Daniel McDougald ?

8th. When and of whom did you purchase Judy, Fanny, Nancy, Eliza, Betty, Big Caroline and her child, Emma and Tom, Charles or Dillingham, Peter or Pete ? State the time of the purchase of each one, the price paid, and in what paid, and what evidence of title, or what conveyance was executed by vendor to you ? What the value of the annual hire of said negroes since the 24th September, 1846 ?

9th. What did you agree to give for the rent of the wharf property for the year 1850, 1851, and 1852, and at what time was the rent for each year due, and how much of the rent of each year have you paid, and to whom paid, and how much is yet due, and to whom due ? Have you not settled with each member of the company or proprietors of the wharf, for his respective and several share or interest in the same ?

10th. When, in what year did you for the first time, give in and pay taxes on the said tract of land referred to in the preceding interrogatory ?

11th. What is the annual value of the rent of said tract of land for the years 1849, 1850, 1851, and 1852 ? How much cleared land on the tract those years, and what quality of land ?

12th. What title deeds were those of which you speak in your written answer to the order in this case, by whom executed, to whom and when made, on what consideration, and who paid it?

13th. Did not Daniel McDougald mortgage said land to one James Holford some years since, and state when said mortgage was executed, and state whether you ever made and communicated any objection to said Holford or his counsel, and did you not know who his counsel was to the execution of said mortgage, and was not the same recorded in Russell County, Alabama?

Defendant's solicitors demurred to or objected to the defendant, Duncan McDougald's answering any or either of said interrogatories, on the following grounds, to wit:

1st. Because the land near Girard, Alabama, being stated in the deed to be in the possession of Duncan McDougald, the law presumes it to be adverse to Daniel McDougald, and therefore, the deed from Daniel McDougald is void.

2d. Because the land lies in Alabama, and consequently, beyond the jurisdiction of this Court.

3d. Because the interrogatories go beyond and outside of the stating or charging part of complainant's bill, and therefore, ought not to be allowed.

4th. Because the bill does not allege that the property inquired about in interrogatories, was in fact the property of Daniel McDougald; it merely states it was contained or specified in the deed of assignment.

5th. Because the interrogatories are irrelevant to any matter in issue in the pleadings, or which could be put in issue without their being amended.

7th. Because the interrogatories are merely "fishing."

8th. Because they require a discovery of matters and a production of papers relating to the title and rights of the defendant exclusively, and not to the title of the plaintiff.

9th. Because the interrogatories go far beyond an inquiry concerning an interest only, of Daniel McDougald, deceased, in the land.

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10th. Because the interrogatories were contrary to Law and Equity, and the practices and usages of Courts of Equity, and of the Master's office.

The Court overruled the objections, and defendants excepted.

Duncan McDougald filed answers to all of these interrogatories, denying the title of Daniel McDougald to any of the property in his possession—setting forth the time of his purchases—the persons from whom he purchased, and the amounts paid.

In answer to the 9th interrogatory, he stated, that he agreed to pay for rent of the wharf property for the year 1850, \$3,745; for the year 1851, \$4,300; for the year 1852, \$4,556. He has paid of the rent for 1850, \$3000; of the rent of 1851, \$3,400. The rent for 1852 is not due until November. The above amounts were paid to various corporators of the Columbus Wharf Company, as he believes, according to their respective interests. He rented the property from the Columbus Wharf Company.

The Court, in its final order, required Duncan McDougald to deliver up to the receiver all the negroes and property in his possession, named in the deed of assignment. Also, to attorn to the receiver for one-half of the wharf property, and to pay over to him one-half of the amount of the rent for 1850, 1851, and to give his note for one-half the rent for 1852. To which order, defendants excepted.

The complainant then produced a deed, conveying all the property named in the said deed of assignment, and the object of which was to convey the legal title to the receiver, and moved the Court to order the defendant, Seaborn Jones, to annex his signature thereto.

Jones objected, unless he was permitted to add thereto a protest, "that he did not thereby admit that the alleged deed of trust is, or ever was, valid and binding on him; or that the recitals in the proffered draft or deed were true." Also, that the deed made him convey to the receiver certain pieces of property to which he claims title adversely to McDougald. The Court overruled the objections and required him to sign the deed then and there presented. To which decision defendant excepted.

The defendants then moved the Court to pass the following order :

“ The defendants having filed their answers denying the execution and delivery of the deed of trust, and alleging that no creditor ever accepted the same or its provisions, and further alleging that Daniel McDougald did, in his lifetime, destroy said deed of trust and revoke the same ; and also further alleging that Ann E. McDougald, one of the defendants, and also administratrix of Daniel McDougald, deceased, had tendered to the complainant, William Dougherty, the sum of thirteen hundred dollars, a sum sufficient to discharge and pay off the whole amount, principal, interest and cost, due the said complainant, William Dougherty ; moved that the order appointing Adolphus S. Rutherford receiver, be revoked and rescinded, on the following grounds, to wit :

1st. Because there never was any legal execution and delivery of said deed of trust.

2d. Because no creditor of said Daniel McDougald ever accepted the said deed and the provisions of the same.

3d. Because the said Daniel McDougald kept the said deed, and also all the property and titles to the same, and the rights and credits mentioned therein, in his possession, and before his death revoked the said deed by destroying the same.

4th. Because the said Ann E. McDougald has tendered to the said complainant, William Dougherty, the sum of thirteen hundred dollars, a sum sufficient to pay off and discharge the whole of his debt, principal, interest and cost.

5th. Because said receiver was appointed without notice, or the service of said bill upon any other of said defendants than the said Seaborn Jones.

6th. Because the said Adolphus S. Rutherford, the receiver, was, at the time of his appointment as receiver, Deputy Sheriff, and is now acting Sheriff of Muscogee County, and the duties of said offices are, or may be, in conflict with each other.

7th. Because said deed, if duly executed and delivered, is void.

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8th. Because there is in the hands of the administratrix, assets ample and sufficient to pay complainant's debt, and that there are other persons liable and bound for the payment of complainant's debt, who are entirely solvent and responsible, and out of whom the same might be collected.

9th. Because said bill, although a creditor's bill, is alone the bill of the complainant, William Dougherty, and when the amount due him is paid or tendered, it is the right of defendants to have the order appointing receiver, revoked and rescinded.

10th. Because the security required of said receiver is insufficient, it being for too small a sum, is not payable to the proper party, is illegal and improper in its condition and is in other respects void.

11th. Because the whole proceedings in the appointment of receiver and the subsequent orders in relation thereto, are irregular, informal and unauthorized by the rules, practice and usages of a Court of Equity, or by Equity or Law.

12th. Because the answer of the defendants fully swears off all of the Equity contained in the bill.

13th. Because the said defendant, Duncan McDougald, has again tendered, and now before the Chancellor, tenders and offers to pay said complainant the entire amount of principal, interest and cost due on his debt and the cost of this suit, to wit, the sum of thirteen hundred dollars.

The said Dougherty then and there opposed the granting of said motion, and thereupon the Judge overruled the same upon all of the grounds. Thereupon said Jones, Duncan and Alexander, then and there excepted to said decision.

On the 14th February, the said Ann Eliza appeared and presented in writing, her answer as above set forth, and asked that the same might be held a sufficient showing against such orders, and that said orders might be discharged as to her; thereupon the plaintiff objected and the Judge refused to grant said request, but held that such answer was not sufficient, and thereupon the said Ann E. by her counsel excepted.

The plaintiff's solicitors then moved for an order requiring the said Ann E. McDougald to turn over to Adolphus S. Rutherford

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as receiver, certain property specified and described in the draft of the order presented, and thereupon counsel for the said Ann E. McDougald objected to that portion of the order requiring her to pay over to the said receiver the money collected of Tomlinson Fort, on the grounds following to wit :

1st. Because her answer showed that she did not have the money in her possession.

2d. Because her answer showed that it had been duly administered, having been paid to or on a judgment in favor of the Mechanics' Bank *vs.* her intestate, Daniel McDougald, one of the oldest, if not the oldest judgments against said Daniel.

3d. Because her answer showed that said Daniel, in his lifetime, had agreed with the said Fort to receive a sum much less than the actual amount due, in full discharge of the debt, and thereby revoked said deed of trust *pro tanto* at least. Counsel for Ann E. McDougald further objected to that portion of order requiring her to turn over or deliver to said receiver, the negroes Hannah and Lucy, because the negroes, Hannah and Lucy, admitted to be in her possession, do not fit the description of the Hannah and Lucy specified and conveyed in deed of trust; Counsel for Ann E. McDougald also further objected to the order so far as it requires her to turn over to receiver the negro man, Reuben, because her answer shows that an action of trover for his recovery is now pending against her, as administratrix of Daniel McDougald. And counsel for Ann E. also object to said order, because it is informal, irregular, and contrary to rules and practice of Courts of Equity, or of Equity and Law.

The Court overruled all these objections, and counsel for defendants excepted.

Subsequently the complainant, Wm. Dougherty, moved to amend his bill by inserting Ann E. McDougald in her representative capacity, as the administratrix of Daniel McDougald, deceased, as a party defendant to the bill; and also inserting the names of various other creditors as parties complainant to the bill. This amendment was not verified by affidavit.

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Various objections were made to its allowance, unnecessary to be specified in the view taken of it by the Supreme Court.

The allowance of the amendment was excepted to by defendants.

BENNING, for Ann E. McDougald *et al.*

WM. DOUGHERTY, for complainants.

By the Court.—LUMPKIN, J. delivering the opinion.

William Dougherty, in behalf of himself and other creditors of Daniel McDougald, deceased, filed his bill in Equity, in the Superior Court of Muscogee County, against Seaborn Jones, Ann E. McDougald, Alexander McDougald, and Duncan McDougald, returnable to the May Term, 1851, of said Court. The bill alleged, amongst other things, the execution and delivery of the deed of trust, by the said Daniel McDougald in his lifetime, to the said Seaborn Jones and one Robert B. Alexander, for the benefit of his said creditors; the acceptance thereof by the said trustees, and the subsequent death of Alexander, and prayed for the removal of Jones on account of his misconduct and refusal to perform said trust, the substitution of another trustee in his stead, and the appointment of a receiver in the meantime, to take charge of, preserve and manage, the trust property.

On the 9th of April, 1851, on the hearing of complainant's application, one Adolphus S. Rutherford was, by the order of the Court, appointed receiver, being required before entering on his duties as such, to enter into bond with good security, payable to the Governor of the State, in the sum of ten thousand dollars, for his good conduct.

A motion was made, that the order appointing Adolphus S. Rutherford receiver, be revoked and rescinded, on a great variety of grounds, to wit: Because there was never any legal execution and delivery of the deed of trust; that no creditor ever accepted the appointment, and the provisions thereof; that the

grantor retained the deed, together with the property and the titles to the same, in his own possession, and previous to his death destroyed the conveyance; that Mrs. Ann E. McDougald tendered to the complainant, Dougherty, the sum of \$1,300, an amount sufficient to pay off and discharge the whole of his debt, principal, interest and cost; that the receiver was appointed without notice or the service of the bill upon any of the defendants, except Jones; that Rutherford, at the time of his appointment, was Deputy Sheriff, and is now acting Sheriff of Muscogee County; and that his duties as receiver and Sheriff, are, or may be, in conflict with each other; that the deed of assignment, even if duly executed, is void; that there is in the hands of the administratrix of Daniel McDougald, assets ample to pay complainant's debt; and besides, there are other persons liable and bound for the same, who are entirely solvent and responsible, and out of whom the demand might be collected; that the bill, although nominally a creditor's bill, is alone the bill of the complainant Dougherty, and when the amount due him is paid or tendered it is the right of the defendants, to have the order appointing a receiver annulled; that the security required of the receiver, is too small—is not payable to the proper party—is illegal and improper in its condition, and is in other respects void; that the whole proceedings in the appointment of receiver, and the subsequent action in relation thereto, are irregular, informal, and unauthorized by the rules of practice of a Court of Equity, or by Equity or Law; that because the answer of the defendant fully swears off all the Equity contained in the bill, and because the said defendant, Duncan McDougald, has again tendered, and now before the Chancellor tenders and offers to pay said complainant, the entire amount of principal, interest, and cost due on said debt, and cost of the pending suit, namely, \$1,300.

I shall not attempt to examine every point made in this heavy record, which we have scrutinized with great care and attention, but shall endeavor merely to touch upon the main questions which it presents.

[1.] Counsel for the plaintiffs in error have totally misappre-
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hended the nature of this bill. It is not a bill of *quia timet*, nor is the nature of such a proceeding.

[2.] A creditor has two resources for paying his debts ; either to pursue his debtor personally in his lifetime, or his estate since his death ; or to ask the aid of a Court of Equity, to enforce a trust which the debtor had created for his benefit, in common with the other creditors. He resorts to the latter course, and he is clearly entitled to the assistance of Chancery, to have the trust executed. Hence, in writing out the opinion delivered by the Court in this case, when it was up before, twelve months ago, I stated that the allegation in the bill, that there were other *fi. fas.* which would hinder or delay the creditor, if he attempted to proceed with his execution at Law, to enforce his judgment lien, was not the foundation of his equity ; nor did it give to the Court its jurisdiction. That it was upon another and altogether different principle, namely : the application of one creditor in behalf of himself and all others, who choose to come in, to enforce the execution of a trust made for their benefit.

Neither is the appointment of a receiver, under such a bill, predicated necessarily, upon the apprehended loss of the debt. It would be sufficient to allege that the trustee appointed refused to perform the trust ; and that of itself, would be ground enough to authorize the Court to appoint a receiver ; and this simple, but true exposition of the nature and object of this proceeding, will strip it at once of many of the difficulties which have been thrown around it.

All the law points adjudicated by this Court, in this case, at this place in July, 1851, (10 *Geo. Rep.* 273,) stand affirmed, upon the facts which were then before us. For while we do not profess to be bound by the authority of our decisions, "as firmly as the Pagan deities were supposed to be bound by the decrees of fate," still we must be clearly convinced of their error, before we shall feel it to be our duty to overrule them.

All the issues made by the answers, such as the denial of the delivery of the deed of trust, and its acceptance by the creditors ; the allegation that the assignor kept the deed, and also, the property and titles to the same, in his possession, and before his

death revoked the deed by destroying it; that there is in the hands of the administratrix of Daniel McDougald, assets amply sufficient to pay complainant's debt; and that there are other solvent persons bound for the same—are matters *in pais*, dependent on the proof; and conceding that the material facts stated in the bill, are flatly denied, nevertheless, we should continue the receiver until the final hearing.

Whether the security required of the receiver was sufficient, and Mr. Rutherford a suitable person to fill the office, are matters of discretion; and having no evidence that the power thus entrusted to the Court, has been wantonly or injuriously exercised, we shall not undertake to control his judgment in these particulars.

[3.] It is objected that the whole proceedings, in the appointment of a receiver and the subsequent orders in relation thereto, were irregular. I would remark that these proceedings before a Master, are in the nature of an informal bill in Equity; and supervisory Courts will not interfere, unless substantial errors or defects exist.

[4.] If any great right or public policy has been violated by the Master, relief will be afforded otherwise. Not much is left to the discretion of the Master. We see nothing, in our opinion, which amounts to this, so far as the formal objections taken to the various rulings of the Circuit Judge, sitting as a Master in Chancery, are concerned. He has performed the most arduous services, voluntarily and gratuitously, and for which, as an example, he deserves well of the country.

[5.] This extra-judicial mode of investigation, is of very great advantage, by relieving the Court at its regular terms, from the performance of burthensome duties, and thus enabling it to exercise its regular jurisdiction in a much more beneficial manner. (See *Jeremy's Equity Jurisdiction*, 292, 293.)

[6.] Let us briefly consider, however, some of the more important points of this case. And first, is the tender proven here, sufficient to require the removal of the receiver? Candor compels me to confess that for myself, I have grave doubts upon this question. Had the tender been formally pleaded, which it is not, and which is of itself a good reason for not allowing it,

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and had it been made by Mr. Jones, the assignee, or by Mrs. McDougald, as the administratrix of her deceased husband, who owed the debt, and whose estate is liable for its payment, after she had been made, in her representative character, a party defendant to the bill, I should feel constrained, upon principle as well as authority, to compel the plaintiff to accept it, and to arrest his bill till he did. It is not made however, by the party who is the debtor and defendant in this case. It is made by Mrs. Ann E. McDougald and by Mr. Duncan McDougald, against whom no decree is prayed, and for the payment of Daniel McDougald's debt. Whether the reasoning applies to them, I am not prepared to say; the cases cited certainly do not go so far.

[7.] The reply of the defendant in error, that inasmuch as one creditor could not sue alone, to enforce this trust, that payment to him cannot arrest the suit, is not satisfactory. True, one creditor cannot sue alone, to enforce payment of his demand, out of a common trust fund, which has been set apart for himself and others. *Story's Eq. Pl.* §. 157. He must allow others to come in under the decree, and share in the proceeds.

[8.] But this, we apprehend, does not interfere at all, with another equally well established doctrine, that up to the time of the decree, it is a suit only between party and party, and the plaintiff is *dominus litis*, or master of his own case. He may dismiss or compromise it, or make any other disposition of it which he sees fit; and as a correlative right to this, the defendant may tender satisfaction, and compel him to accept it.

The tender, I repeat, not having been formally pleaded, and not having been made by the debtor party, we will leave this principle undisturbed for the present.

[9.] As to the several orders which were passed, requiring Ann E. McDougald and Duncan McDougald to deliver up to the receiver the property in their possession, because it was contained in the deed of assignment, we are clear, that no Judge in this State, sitting either as Master or Chancellor, possesses such power.

[10.] This property was held by third persons, who claimed

adversely to the deed of trust, and who, by their answers, attacked the validity of that instrument. A Chancellor in England would hardly venture to decide upon such a disputed title, without the aid of a Jury. It is conformable, I know, with the practice of the British Chancery, and is considered there peculiarly proper, when titles are disputed, especially in relation to land, to desire an inquisition by a Jury. And Mr. *Maddock*, (in his *Chancery*, 2 vol. p. 276,) says, that "In all doubtful cases, the Court *will* direct an issue, in order to relieve its own conscience, and to be satisfied by the verdict of the Jury, of the truth or falsehood of the facts controverted, lest taking it upon itself to pronounce decidedly, a matter of such uncertainty, it might do injustice to one of the parties, by determining against the real truth of the fact."

If a Chancellor in England would not undertake to decide upon antagonist facts and deductions, but would summon a Jury to his aid, much less will a Master in Chancery, in this State, claim to exercise this right without the aid of an inquisition.

[11.] *Their* province is, and by far the most extensive branch of their cognizance, to investigate accounts; to make sale of property under a decree in Equity; and for the purpose of facilitating their inquiries, and rendering them more effectual, they are often empowered to examine witnesses, or even parties to the cause. In England, they are often called upon to *examine* titles to estates, and to settle conveyances. But even the business of *examination merely*, is rarely confided to the Master here, much less the power of *passing* upon them.

And this view applies to all the property in the hands of Duncan McDougald. For even as it respects *Peter*, the negro that he purchased of Daniel McDougald, in 1847, the year after the assignment was made, controverting as he does, the legality of that deed of trust, this slave should not be wrested from him, except by due course of law. Admitting that the conveyance is valid, it may be well doubted how far the title of a *bona fide* purchaser from Daniel McDougald, who was in possession of the property when he sold, would not be protected, and the

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transfer made two years before any creditor had signified his acceptance of the trust.

As to the wharf lots, they stand upon a different footing. Duncan McDougald sets up no title to them. To the extent, however, that the order directed peremptorily Duncan McDougald to account to the receiver, and for a specified amount, we think it was wrong. He leased these lots of a Company, of which the deceased was a member; and consequently, the receiver in this, as in all other respects, is remitted to the rights which the assignor held in this, and all other property embraced in the deed; and he must assert these rights according to law.

As to Mrs. Ann E. McDougald, she too contests the validity of this assignment. Her husband died intestate with the property which she holds in his possession. Notwithstanding the deed had been executed more than four years previously, she administered on his estate, took possession of it, and had it inventoried. She has given bond and security for its safe keeping and faithful administration; and under these circumstances, until the title is litigated and settled by a decree, we do not think that she ought to be ousted or dispossessed in this summary mode.

If the receiver conceives that any portion of the property in dispute, is in danger of being eloiigned, or otherwise wasted or mismanaged, he has all the remedies at his command, both at Law and in Equity, to prevent any detriment to the creditors.

As to the money collected by Mrs. McDougald of Dr. Tomlinson Fort, on the debt which is set forth in the deed of assignment, even if that conveyance is established—if it has been duly administered by being paid to a judgment in favor of the Mechanics' Bank, one of the oldest, if not the oldest, against Daniel McDougald, and with which the trust would be charged, the Jury upon proof of these facts, would on the hearing of the bill, allow her this credit, or subrogate her to the rights of the creditor for this sum.

[12.] A question of practice, as to the mode of interrogating parties by the Master in Chancery, is urged upon the

consideration and determination of this Court. Its settlement, the one way or the other, can in no wise affect or change the result in this case. The question is, shall a party to a suit, when examined by the Master in Chancery, be interrogated *viva voce*, or shall interrogatories be filed in writing, to which he shall make answer.

[13.] In England, we believe that *witnesses* are sometimes examined *viva voce*. (*Smith's Ch. Pr.* 147, 148.) And if parties submit to a *viva voce* examination, it would not vitiate the proceeding. Indeed, for ourselves, we believe that in the case either of witnesses or parties, that the *viva voce* mode is unquestionably the better practice, in order to search the conscience and extract the truth. We believe, however, that in case of *parties*, the regular course is for counsel to prepare written interrogatories, which are submitted to the Master for his approval; and when approved, are handed over to the party to be examined, who being allowed a reasonable time, returns his answer to the same. *Smith's Ch. Pr.* from 122 to 125, and the authorities there cited. If additional interrogatories are deemed essential, they are to be prepared and executed in the same manner.

The party has a right to demand this, and it is a right of which he cannot be deprived, against his will.

Interrogatories to the parties are provided for the same purpose, as are interrogatories in a bill. They are substituted for the latter as a more convenient mode, to extract the truth from the conscience of the defendant. And as the party interrogated by the bill, is never required to submit to an oral examination, neither should he be, before the Master. It is unnecessary to enlarge upon this rule.

Thirteen interrogatories were propounded to Duncan McDougald. Defendant's solicitors demurred to, or objected, as the bill of exception states, to the defendant, Duncan McDougald's answering *any* or *either* of said interrogatories, on ten grounds, which are stated.

[14.] To elucidate the folly under our improved and enlightened Judiciary, of sticking in mere matters of form, for which I profess to have no taste whatever, I would state, that if

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this exception is to be decided on the *form*, then it is certainly not well taken. For the rule is, that if one general exception is taken to the Master's certificate, approving of *all* the interrogatories, the party excepting will succeed, if he shows that the Master was wrong in allowing any *rule*; but if the exception is because the Master ought not to have allowed *any*, then if any *one* was proper to be allowed, the general exception fails as to all; and the Vice Chancellor, in *Moore vs. Lankford and wife*, (6 *Simons*, 323,) said that the distinction was so obvious, that he could not conceive that any person could have any doubt upon the subject. *Ac etiam*, *Pearson vs. Knapp*, *T. M. and K.* 312. *Kothun vs. Best*, 1 *Beavan*, 380. *Hopkinson vs. Bogster*, 1 *G. C.* 13.

Now while we might grant that a portion of these interrogatories were objectionable; yet we are clear, that there were others which were right and proper to be answered. The exception, consequently, must fail as to the whole.

[15.] At the May Term, 1852, of the Court, the complainant was allowed to amend his bill, by making Edward Carey, assignee, John Banks and others, parties complainants, and Ann E. McDougald as administratrix, a defendant; and other alterations were made to correspond with this change of parties. It was further ordered at the same time, that Ann E. McDougald, as such administratrix, be served with a copy of said bill as amended, at least sixty days before the next term of the Court; and that she plead, answer or demur, to such bill as amended, not demurring alone, on or before the first day of said next term; that the other defendants be served with a copy of the amendment, sixty days before the next term of the Court; the complainant expressly waiving the answer of the other defendants, to said amendment to said bill.

In the first place, was it allowable to make this amendment? With respect to this point, there can be no doubt. New parties may be introduced upon the record, either as plaintiffs or defendants. It is a familiar practice to allow a creditor, suing for his own private debt only, to amend his bill at the hearing, by converting it into a bill on behalf of himself and all other creditors.

Milligan vs. Mitchell, 1 *Mylne and Craig*, 433. *Hichens vs. Congreve*, 4 *Russell*, 592. In *Attorney General vs. Newcombe*, (14 *Ves.* 1,) Lord *Eldon* said, he should allow an informality in the bill in not stating that the plaintiffs sued on behalf of themselves and all others interested, to be amended even at the hearing. And it seems that whether the parties introduced on the record are made plaintiffs or defendants, is utterly immaterial; the only restriction being, that a plaintiff who amends under such considerations, shall not be permitted to make a different case. No new case is made in this record; it is still the creditors of McDougald, seeking to enforce the execution of the trust made for their benefit; and the only new matter introduced in the amendment, consists of allegations and charges explaining the claims of the new plaintiffs. As it respects the addition of Mrs. McDougald as administratrix, as a party defendant, we think it was entirely proper that she should be brought in. The protection of her intestate's estate, who is the debtor, made this amendment almost as desirable to her, as it was made indispensable to the plaintiff. But this being a sworn bill, we are of the opinion that the Court erred in allowing the complainant to make a material amendment, not verified either by the affidavit of the original or the new parties.

It may not be absolutely necessary to decide whether or not the time given to Mrs. McDougald, was sufficient; situated as this case was, under the amendment. She was introduced for the first time, upon the record, as a party defendant, and that too, in her representative character; and she was required to plead, answer, or demur, at the next Term of the Court, after being served with the amendment. The amendment consisted of making numerous other creditors of her deceased husband plaintiffs to the bill; and their various demands were inserted, and she required to answer them.

[17.] Every amendment is an indulgence given by the Court, and is granted to the mistakes of the parties and with a view to save expenses.

[18.] But when this indulgence is allowed, the Courts should

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see to it, that it is done upon such terms as that injury may not arise to others, who are not in default.

[19.] And if the new matter brought into the bill by way of amendment will affect either the parties to it or strangers, it should not have relation back to the time of filing the original bill; but the suit will be considered as pending, only from the time of the amendment. *Story's Eq. Pl.* §. 904.

For myself, I must say that a fair and liberal indulgence to prepare her defence, was not extended to this defendant, who was an innocent party.

[20.] The only other matters to be noticed, is the protest of Seaborn Jones, against signing the draft of the deed to Rutherford, the receiver. After specifying the property contained in the original assignment from McDougald to Jones, the copy continued thus: "Now this indenture made this thirteenth day of February, eighteen hundred and fifty-two, between the said Seaborn Jones, as such surviving trustee, of the one part, and the said Adolphus S. Rutherford, as the receiver, of the other part, witnesseth, that the said Seaborn Jones, as such surviving trustee, for and in consideration of the premises, and in obedience to the order of the Court, hath aliened, conveyed and assigned, released and relinquished, and quit claim, and by these presents, doth alien, convey and assign, release and relinquish, unto the said Adolphus S. Rutherford, as such receiver as aforesaid, the aforesaid property and effects, together with all the rights, title, claim to, or interest vested in the said Seaborn, as such trustee, by *virtue of said deed of the said Daniel McDougald, &c.*"

Jones objected to executing the deed in the form as above set forth, and asked that he might be allowed to insert in said deed, "that though signing the same, he, said Jones, protests that he does not thereby admit that said alleged deed of trust is, or ever was, valid or binding in any way upon him; or thereby admits that the recitals contained in said proffered draft of a deed, or the recitals contained in the orders stated in said draft deed to be true." He further objected to executing the same as presented, because "he is thereby made to convey away certain pieces of property which are his own, namely: Lot No. 173, in

said City of Columbus, commonly called the Shylock Corner ; and also lot No. 184, in the same city, which he claims adversely to said alleged trust deed, and because no reservation or provision is made in said deed, for the protection of the said Jones, in reference to his right or claim to said lots."

The Judge overruled these objections, and refused to allow Jones to insert his protest ; and also, overruled his objection to executing the same, on other grounds, and required him (Jones) to sign the draft deed as presented.

Our judgment is, that it was wholly unnecessary for Mr. Jones to make this protest ; that he conveyed away no rights or interest, except such as were vested in him *as trustee*, by virtue of the deed of assignment from Daniel McDougald ; that he could not be prejudiced by any recitals in this copy paper, it being executed by him *in invitum*, under the order of the Court. I have serious doubts, as to the propriety of requiring this transfer to be made. The appointment of the receiver vested in him the authority to control this property, while his office continued.

No. 68. JANE S. WILLIAMS *et al.* plaintiffs in error, vs. ROYAL R. JENKINS, defendant in error.

- [1.] On a proper case made, it is competent for the Chancellor to appoint a receiver, on the *ex parte* application of the complainant, before answer, the facts being verified by his affidavit.
- [2.] A Court of Equity has jurisdiction to appoint a receiver at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portion thereof, when such co-tenants are *insolvent*.

In Equity, in Sumter Superior Court. Decision by Judge WARREN, on application for the appointment of a receiver, at Chambers, June, 1852.

Williams and others vs. Jenkins.

Royal R. Jenkins filed a bill returnable to the Superior Court of Sumter County, alleging that in the year 1851, he sold to Wesley A. Williams, Abraham G. W. Williams, and Jane S. Williams, a certain tract of land in Sumter County, with valuable mills and other improvements thereon, for the sum of \$5,500, due in three instalments; that he first gave them his bond for titles, but afterwards an absolute deed in fee simple; that there had been payments made on the notes so as to reduce the amount due to \$3,700, none of which was due; that the defendants, Williams, were utterly insolvent, having no other property besides these mills; that two of them had conveyed their interest to one Horne, who took it with notice of complainant's lien as vendor for the purchase money. The bill was filed to enforce this lien, and prayed a sale of the two-thirds interest claimed by Horne; and after paying complainant's claim, that the balance be paid to Horne.

Subsequently, complainant filed a supplemental bill, charging that complainant, since the filing of said bill, had purchased the undivided one-third part of Abraham G. Williams in said land, and thereby became tenant in common with other owners; that he had applied to Jane S. and Wesley A. to be let into the possession and enjoyment of the said premises, as a tenant in common; that Jane S. Williams referred him to one William Horne, to whom she said she had sold all her interest; that he went to Horne, who confirmed the story, and said he was in full possession; that he and Horne then entered into an arrangement for the carrying on of the business and working the mills; that they jointly hired hands and went into the immediate possession of the same. A few days afterwards, Horne abandoned the mills, and complainant being absent, Mrs. Williams took possession of the mills and locked up the doors; complainant on his return, unloosed the doors and took possession again. Mrs. Williams sued out a process of forcible entry and detainer, and on the trial, Horne, as a witness, swore that all the representations of himself and Mrs. Williams to complainant, were untrue—a mere pretense and sham, intended to force him to sell out his share at a nominal sum. The Jury found for Mrs. Williams,

and complainant turned out of possession. Since that time complainant has made various propositions (set forth at length in the bill,) to Mrs. Williams for the joint working of the mills, or for securing to each their portion of the profits, (alleged to be \$1,000 to \$2,000 per year;) that Mrs. Williams and Wesley A. are in the exclusive possession of the mills; that they manage them in a negligent, careless, and unskilful manner, and are reputed in the neighborhood, to be dishonest and untrustworthy as 'millers, and consequently, the mills are losing much of their custom; that the said Jane and Wesley, are continually devising means to defraud complainant out of the balance due him for the purchase money, and also his interest as tenant in common; that they are wholly worthless and insolvent, except as to the amount of their interest in said land and mills; that they have threatened to sell the land to a *bona fide* purchaser without notice, and thus destroy the vendor's lien.

The prayer of the bill was for the appointment of a receiver to take possession of the lands and mills, to keep the same in repair, work them, and account to the Court for the profits until the farther order of the Court.

On motion at Chambers to appoint a receiver, the same was resisted by counsel for defendants, because complainant had a complete remedy at Law.

The Court appointed a receiver, and this decision is assigned as error.

MOORE and WORRILL, for plaintiff in error.

E. R. BROWN and SULLIVAN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

This was an application to the Chancellor to appoint a receiver, on the *ex parte* application of the complainant. The facts alleged in the bill, were verified by the affidavit of the complainant.

[1.] On a proper case made, it was competent for the Chancellor to appoint a receiver, on the *ex parte* application of the com-

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planaint, before the answer of the defendant was filed. *Jones vs. Dougherty*, 10 *Georgia Rep.* 274.

[2.] Do the allegations in this bill shew that the discretion of the Chancellor in the appointment of a receiver, was properly exercised? The complainant is the owner of one-third part of valuable property consisting of a saw and grist mill, as a tenant in common with the defendants, who are in possession of the same, which is of the annual value of one or two thousand dollars.

The complainant alleges the bad management of the mills by the defendants—their intention to defraud him, as manifested by their various acts, which the complainant specifically alleges, and that they are *insolvent*, except as to their interest in the mill property; that there is now due the complainant for the original purchase money of said mills from the defendants, the sum of \$3,716 00. Assuming the original price paid for the property, to be its true value, (to wit) \$5,500 00, the two-thirds thereof, which the defendants now own, is worth about the sum of \$3,666 00, which is *less* than the amount of the original purchase money now due the complainant, so that when the original purchase money shall be paid to the complainant, (for which he asserts his vendor's lien) the defendants will have *nothing to pay him* for his share of the annual rents and profits thereof. The defendants are in the possession and enjoyment of the property, and refuse to allow the complainant to participate in the same, in any manner whatever. The complainant shews that he has offered to take possession of the mills, and give bond and security to the defendants, to account to them for their share of the profits; or to let them continue in possession on their doing the same, to account to him for his share of the profits, which they have refused. The plaintiff in error, however, insists that a Court of Equity will not interfere, and appoint a receiver, at the instance of one tenant in common against another, who is in possession, because the party complaining may relieve himself at Law, by a writ of *partition*. Concede that the complainant in this case might have a writ of partition at Law, for his share of the property, what adequate remedy has

he at Law, in the meantime, for the *profits* of the mills, while in the possession of the defendants, who are *insolvent*?

We entertain no doubt that a Court of Equity has jurisdiction to appoint a receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portion thereof, when such tenants are *insolvent*. 2 *Story's Equity*, §. 833. *Street vs. Anderson*, 4 *Brown's Chan. Rep.* 415. *Milbank vs. Revel*, 2 *Merrivale*, 405. The discretion of the Chancellor in appointing a receiver in this case, was, in our judgment, properly exercised; therefore, let the judgment of the Court below be affirmed.

No. 69.—THOMAS GILBERT, plaintiff in error, vs. WM. M. HARDWICK, defendant in error.

- [1.] A case is not discontinued, when permitted to lie over without any action therein, for a number of terms, by the Court.
- [2.] At Common Law, the powers of an *administrator de bonis non*, extend only to the administration of the estate, so far as it was unadministered when he came into the trust. He cannot call the removed executor to account, nor can he collect the purchase money for property sold and administered by his predecessor.
- [3.] A sale of property is *pro tanto* an administration, and the executor becomes chargeable, and may keep the purchase money in his personal character, or in his representative character, as *executor*. When the action is in the latter form, the descriptive allegations are matter of substance, and it cannot be converted into an action in his individual right, by striking them out as *descriptio personæ aliter*, when he describes himself *executor*, &c. &c.

Certiorari, in Stewart Superior Court. Decision by Judge IVERSON, April Term, 1852.

Wm. M. Hardwick, as executor of Daniel Gilbert, brought suit against Thomas Gilbert, for the recovery of the purchase money for certain negro slaves sold by said Hardwick, as the executor of Darius Gilbert, deceased. In the declaration, he described himself as "Wm. M. Hardwick, executor of Darius Gilbert, deceased;" made profert of his letters testamentary, and prayed process to issue, to answer him in a suit, *as executor, &c.* The suit was returnable to the Inferior Court of Stewart County. At the April Term, 1844, of said Court, the plaintiff had an entry made upon the Bench docket, suggesting his removal from the executorship of said estate. The cause remained in this condition until July Term, 1851, of said Court; when, upon motion of defendant, it was ordered that parties be made, at the next term, or the case be dismissed. At January, 1852, no parties being made, nor any effort to make parties, the case was dismissed. To this order of dismissal, Hardwick sued out a writ of *certiorari*.

At the April Term of the Superior Court, the *certiorari* came on to be heard, when defendant moved to dismiss the writ, on the ground that Hardwick was not the proper party to sue out a writ, but the same should be sued out by the administrator *de bonis non* of Darius Gilbert.

The Court overruled the motion, and counsel for Gilbert excepted.

Upon hearing the return to the *certiorari*, the Court sustained the writ, and ordered the case re-instated; holding—

1st. That the right of action for the purchase money of the property sold, accrued to Hardwick individually, and did not pass to the administrator *de bonis non*.

2d. That the entry made on the docket, at Hardwick's instance, and his permitting the cause to remain stationary for fifteen successive terms of the Court, did not amount to an abandonment of the cause so as to work a discontinuance.

To which decision Gilbert excepted.

On these several exceptions, error has been assigned.

HARRISON and WORRILL, for plaintiff in error.

W. B. GAULDEN, for defendant.

By the Court.—NISBET J. delivering the opinion.

[1.] The lying over of this cause on the docket for so many terms after the suggestion of Hardwick's removal, without any action therein, did not amount to a discontinuance. Up to the time when the order was taken, to make the administrator *de bonis non*, with the will annexed, a party, there had been no motion to speed the cause. It was continued, therefore, from term to term, by the Court. If then, when the Court ordered it to be dismissed, upon the hearing of the rule to make *Rogers* the administrator *de bonis non*, a party, Hardwick, the removed executor, had been in a position on the record to proceed with the action, either in his personal character, or as executor, he would not have been hindered from so doing, by these frequent continuances made by the Court. They are to be considered as having been made by the Court, because the record does not show any motion in the cause, intervening the suggestion of Hardwick's removal and the order to make parties.

[2.] The *Inferior Court* could not have made the administrator *de bonis non* a party, because he had no right at Common Law to sue for the purchase-money of these negroes, for which the action was instituted. The sale was an administration by Hardwick, and the administrator *de bonis non* could neither call Hardwick to account nor collect in the purchase money.

[3.] The administration of this property charged Hardwick, and gave him the right to sue for the price, either in his individual character or as executor. The powers of the administrator *de bonis non*, by the Common Law, extend only to the administration of the estate, so far as it was unadministered when he came into the trust. Nor could he have been made a party under the Act of 1845, for the rights of the removed executor and also his obligations, and also the rights of the administrator *de bonis non* had been fixed before the passage of that Act. It was subsequent to the administration of this property by Hardwick,

and has no application to the case. 1 *Kelly* 80. 5 *Geo. R.* 58. 10 *Geo. R.* 266. *Cobb's N. Dig.* 335.

No attempt was made, however, to make him a party, and he not being made a party, in pursuance of the order, the *Inferior Court* dismissed the action against the claim of counsel for plaintiff to proceed with the cause in the name and right of Hardwick, personally. Was this done contrary to law, is the only question to be considered? The claim set up by plaintiff's counsel to proceed with the cause as stated, is founded on the rule, that the property being administered, the right to the purchase money was in him personally, and by striking out that part of the declaration which describes him as executor, as merely surplusage, the action would stand in his individual name. The rule as stated, is a true rule; but other things are to be considered. First, I inquire how is this action brought? It is brought by Hardwick, in his representative character; he describes himself as executor; makes profert of his letters testamentary, and prays that the defendant appear and answer to his plaint *as executor*. It could not proceed as an action in his representative character, because he had been removed upon his own showing, from the executorship. His removal being suggested on the record, the Court affirmed the fact of his removal, by the order which directed that the cause be dismissed, unless the administrator *de bonis non* be made a party at the succeeding term. That order had the effect of a judgment affirmatory of the suggestion of removal. Nor could the cause be retained as a suit in his personal character, being made such by striking out or disregarding so much of the declaration, as exhibits him in a representative character, as merely *descriptio personæ*. The rule as to *descriptio personæ*, in these cases, is this: if the plaintiff describes himself *executor, &c. &c.*, it is an action in his personal character—the descriptive part being regarded as immaterial. But if the plaintiff describes himself, as he has done in this case, *as executor &c.*, then it is an action in his representative character, and the descriptive part is of substance, and cannot be regarded as immaterial. Whether this distinction be with or without reason, it is the rule of the Common Law,

and was the rule of the Common Law when we adopted it, and it is therefore, obligatory upon this Court. The order of the *Inferior Court*, dismissing the suit, was right; the little word *as*, is in such cases, quite potent. (1 *Chitty's Pleadings*, 205 margin. 5 *East*, 150.)

Let the judgment be reversed.

No. 70.—JOHN B. KENDRICK, plaintiff in error, vs. ISAAC McCRARY, defendant in error.

[1.] A father can maintain an action on the case, for the seduction of his daughter, living with him and under his control, though she be of age; nor is it necessary in such case, to prove an actual contract for services between the father and his daughter. It will be presumed, from any services, however slight, rendered by her, in the family.

[2.] The legal foundation of the action rests upon the assumed relation of master and servant, and not upon that of father and child; nevertheless, in such an action, the father may not only secure the damages he has sustained, by the actual loss of service and the payment of necessary expenses; but the Jury may award him compensation for the destruction of his domestic peace, as well as the disgrace cast upon his family.

Trespass on the case, in Stewart Superior Court. Tried before Judge IVERSON, on motion for new trial, April Term, 1852.

This was an action on the case, brought by Isaac McCrary, against John B. Kendrick, for the seduction of plaintiff's daughter, *per quod servitium amisit*. The Jury returned a verdict for the plaintiff for \$1,049; whereupon, defendant's counsel moved for a new trial, on the ground "that the finding of the Jury was contrary to law and evidence submitted, in this, viz: that it was proven at the trial, that the daughter of plaintiff was twenty-one years of age at the time the seduction took place, and the actual damage to the plaintiff, proved on the trial, was only forty-nine dollars; whereas, the Jury gave one thousand dollars vindictive damages."

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The Court below refused the motion for a new trial, and this decision is assigned as error.

B. K. HARRISON, for plaintiff in error.

WORRILL, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

This was an action of *trespass on the case*, instituted in the Superior Court of Stewart County, by Isaac McCrary against John B. Kendrick, for the seduction of plaintiff's daughter. The Jury returned a verdict for \$1,049; and a new trial is asked, on the grounds that the daughter was twenty-one years old at the time the injury occurred, and there was no contract of service between her and her father; that the service rendered was voluntary. And it is contended that the father could not sue for, and recover damages, for the loss of that which he had no legal right to claim; that the measure of damages was the actual loss sustained; and that the right of action belonged to the daughter and not to the father.

[1.] In cases of this sort, it is not necessary to prove an actual contract between the father and the daughter, in order to maintain the action. Before the child attains the age of twenty-one, the law gives the father dominion over her; and after, the law presumes the contract, when the daughter is so situated as to render service to the father, or is under his control; and this it does for the wisest and most benevolent of purposes, to preserve his domestic peace, by guarding from the spoiler the purity and innocence of his child. *Bennett vs. Alcot*, 2 Term R. 166. *Nicholson vs. Shiller*, 10 John. R. 115. *Merom vs. Davis*, 4 Conn. 417. *Mainoter vs. Nin. M. & M.* 323. Cited, 3 Stephens' N. P. *Hollaway vs. Abell*, 32. Eng. Com. L. R. 615. In the case before us, the daughter lived in her father's house at the time of the seduction, under his control, and in the performance of actual services.

This action was originally given to the *master*, to enable him

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to recover damages for the loss of service occasioned by the seduction of his *servant*. He was restricted in his recovery to the actual damages sustained. The loss of service is still the legal foundation of the action: and the father cannot maintain the action without averring in his declaration and proving on the trial, that from the consequences of the seduction, his daughter is less able to perform the duties of servant; but the proof upon both of these points need be very slight. It matters not how small the service she rendered, though it may have consisted in milking his cows, or even pouring out his tea, he is entitled to his action. *Carr vs. Clark*, 2 *Chitty*, 261. *Mann vs. Barrett*, 6 *Esp.* 23. Indeed, as shewn by the cases cited under the other head, it has been decided, that the father need not prove any actual service rendered, if at the time of the seduction, she lives with her father, or is under his control; and that too, whether she be a minor or an adult. Lord *Denman* held, in *Joseph vs. Cowan*, (cited 2 *Stephens' N. P.* 2354, and *Roscoe on Ev.* 493,) that the father can maintain the action before the confinement of his daughter, and even though he has turned her out of doors.

As to the measure of damages, the rule originally governing the action, has for a long time been so far extended as to authorize the father to recover damage beyond the mere loss of services and expenses consequent on the seduction.

Lord *Ellenborough*, in the case of *Irwin vs. Dealman*, (1 *East*. 24,) says: "however difficult it may be to reconcile to principle the giving of greater damages, the practice is become inveterate, and cannot now be shaken." In *Tulledge vs. Wade*, (3 *Wils.* 18,) Chief Justice *Wilmot* remarks: "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case, may not really amount to the value of twenty shillings, yet the Jury have done right in giving liberal damages." The Court, in *Tilletson vs. Cheatham*, (3 *Johns.* 56,) quoting the foregoing cases with approbation, adds: "The actual pecuniary damages, in actions for defamation, as well as in other actions for loss, can rarely be computed, and are never the sole rule of assessment."

In *Briggs vs. Evans*, (5 *Iredell*, 16,) and upon which I have

already drawn, the Supreme Court of North Carolina, use this strong language : " The second exception is equally as untenable as the first. It assumes that the only consequential injury to the father, of which he has a right to complain, consists in the loss of the services of his daughter, and the expenses he may incur during her confinement. This certainly is not so. If it were so, and pregnancy did not result from the seduction, the father would have no action. All the authorities show that the relation of master and servant, between the parent and child, is but a figment of the law, to open to him the door for the redress of his injuries. It is the substratum on which the action is built ; the actual damage which he has sustained, in many, if not in most cases, exists only in the humanity of the law, which seeks to vindicate his outraged feelings. He comes into the Court as a master, he goes before the Jury as a father."

Never, so help me God, while I have the honor to occupy a seat upon this bench, will I consent to control the Jury, in the amount of compensation which they may see fit to render a father for the dishonor and disgrace thus cast upon his family ; for this atrocious invasion of his household peace. There is nothing like it, since the entrance of Sin and Death into this lower world. Money cannot redress a parent who is wronged beyond the possibility of redress ; it cannot minister to a mind thus diseased. Give to such a plaintiff, all that figures can number, it is as the small dust of the balance. Say to the father, there is \$1049, embrace your innocent daughter, for the last time, and let her henceforth become an object for the hand of scorn to point its finger at ! What mockery ! And yet this is the identical case we are considering.

It has been truly said, that more instructive lessons are taught in Courts of Justice, than the Church is able to inculcate. Morals come in the cold abstract from the pulpit ; but men smart under them practically, when Juries are the preachers. In cases of deliberate seduction, there should be no limitation to verdicts, because there is none to the magnitude of the injury.

The judgment of the Circuit Court is affirmed.

No. 71.—DUNCAN L. NICHOLSON and Wife, plaintiffs in error, *vs.*
BENJAMIN E. SPENCER, defendant in error.

- [1.] A guardian in this State, of the person and property of an infant ward, has the same right to judge as to what are necessities for his ward, according to her estate and position in society, that a parent has for his child.
- [2.] Whenever it appears that such infant ward has a guardian, who has furnished her with such necessities, as in his judgment he regards ample and proper for her support, according to her age and condition, a tradesman who seeks to recover the price of a bill of articles, furnished such infant ward, in *addition* to those furnished by her guardian, must shew, to the satisfaction of the Jury, what is the estate and condition of such infant ward; and must also shew what particular articles of necessity the guardian has furnished for his ward; and that the same are *not sufficient* for her support and maintainance, according to her estate and position in society; and that the *additional* articles, so furnished by him, *were necessary* for such support and maintainance. In such a case, the burden of proof is on the plaintiff, and not on the defendant.

Debt, in Stewart Superior Court. Tried before Judge IVERSON, April Term, 1852.

Benjamin E. Spencer brought suit against Duncan L. Nicholson, and Mary A., his wife, upon a merchants's account for goods &c., furnished Mrs. Nicholson before marriage, and when she was an infant. The defendants pleaded that Mrs. Nicholson was furnished with ample necessities by her guardian, and the articles charged were not necessities.

The plaintiffs proved that the articles were furnished; that the infant had a considerable estate, and that the articles were such as were usually furnished young ladies of fortune. Isaac W. Stokes, one of the plaintiff's witnesses, who was a merchant, states that he could not say all the articles charged in the account were *necessaries*; that he considered some of them extravagant, even for young ladies of property. The defendants proved by the guardian, that "he furnished her with what he regarded ample and proper for her support, agreeable to her age and condition."

The presiding Judge charged the Jury, "that a guardian had not the same right to judge what were necessities for his ward, that a parent had for his child." To which charge defendants excepted.

The Court also charged, "that in the opinion of the Court, it was not sufficiently proven that the guardian had furnished the ward with necessities, suitable to her age and condition, inasmuch as he had not specified the amounts furnished, and what character of articles were furnished; but that the Jury were the proper judges of what were necessary and proper and suitable to her station and condition in life, and that the defendants should show what he did furnish, and let the Jury decide." To which charge defendants excepted.

The Jury found a verdict for the plaintiff; whereupon the defendants moved for a new trial, on the ground of error in the Court, in charging as above specified, and that the verdict was contrary to law and evidence. The rule *nisi* was granted, returnable at the next term. At the next term the motion was continued; and at the next term thereafter, *viz.*, April Term, 1852, when the same came on to be heard, counsel for the motion moved to amend the rule, by adding the following grounds:

1. That Mary A. Nicholson was, at the time of the commencement of this suit, an infant within the age of twenty-one years.

2. The discovery of new and material evidence, since the trial, *viz.*: that Sarah Howel furnished said Mary A. Nicholson, with a considerable amount of clothing and other necessities, in addition to those furnished by her guardian, as proven at the trial.

This last ground was supported by the affidavit of Duncan L. Nicholson.

The Court held, that the rule *nisi* could not be amended, and this decision is assigned as error.

On hearing the original motion for a new trial, the Court refused to make the rule absolute. And to this decision defendants excepted.

And upon these several exceptions, error has been assigned.

JOHN A. TUCKER, for plaintiff in error.

B. K. HARRISON, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

This is an action brought against the defendant and his wife, on a merchant's account, for goods furnished to the wife before her marriage, and while she was an infant under twenty-one years of age.

The defence set up is, that at the time the goods were furnished by the plaintiff to the defendant's wife, she had a guardian, who furnished her with such *necessaries*, &c., as were suitable to her rank and condition in life. At the trial, after the evidence had closed, the Court instructed the Jury "that a guardian had not the same right to judge what were necessaries for his ward, that a parent had for his child; and that in the opinion of the Court, it was not sufficiently proved, that the guardian had furnished his ward with necessaries, suitable to her age and condition: inasmuch as he had not specified the amounts furnished, and what character of articles were furnished; that the Jury were the proper judges of what was necessary and proper and suitable to her station and condition in life; and that the *defendant should shew* what he did furnish, and let the Jury decide." Whereupon, the defendant excepted to said charge of the Court, and now assigns the same for error here.

[1.] This being a question of much *practical* importance, we have given to it our best consideration, in order that the principles of law which govern transactions between infants and tradesmen, may be understood. The first proposition which the Court below asserted in its charge to the Jury, is, that a guardian of an infant has not the same right to judge what are *necessaries* for his ward, that a parent has for his child. Who is a guardian, as contemplated by our law? A guardian of *the person* is one who has been lawfully invested with the care of the person of an infant, whose father is dead, and is considered as standing in the *place of the father*. A guardian of *the estate* is one who has

been lawfully invested with the power of taking care and managing the estate of an infant. 1 *Bouvier's Law Dictionary*, 616. It is most usual in this State, to appoint the same individual, guardian of both the *person* and *property* of the infant, and such we take the guardian of the defendant's wife to have been.

What are the legal duties of parents to their children? The duties of parents to their children, principally, consists in these particulars: their maintenance, their protection, and their education. 1 *Bl. Com.* 446. The same author, in speaking of the private relation of guardian and ward, says that it bears a very near resemblance to that of parent and child; the guardian being only a *temporary parent*, that is, for so long a time as the ward is an *infant*, or under age. 1 *Bl. Com.* 459. "The power and reciprocal duty of a guardian and ward, (*says Blackstone, Ibid*, 462) is the same *pro tempore* as that of a *father* and *child*, and therefore, I shall not repeat them." By our own Act of 18th of February, 1799, all guardians are allowed in their accounts, to charge all *reasonable* disbursements and expenses, *suitable to the circumstances* of the orphan committed to their care. *Prince*, 232.

In view then, of the position which a guardian occupies towards his ward, under the law, and the duties and responsibilities which are necessarily devolved upon him, we hold that such guardian of the person and property of his infant ward has the same right to judge what are *necessaries*, according to his or her estate and condition in life, that a parent has.

[2.] What are to be considered *necessaries*, in the legal acceptance of that term?

Necessaries are such things as are useful and *suitable to the party's state and condition in life*, and not merely such as are requisite for bare *subsistence*. *Peters vs. Fleming*, 6 *Meson and Welsby's Rep.* 46. Such articles of costly apparel, as might be considered necessary for the son or daughter of a *millionaire*, would not be so considered, for the son or daughter of one whose pecuniary circumstances were *small* and *limited*.

The Court in its charge to the Jury, assumed the proposition that it was incumbent on the defendant to shew, that the guar-

dian of his wife had furnished her with the necessary clothing, &c., by specifying the *particular articles* which he did furnish, so that the Jury might judge thereof. We think the Court erred in its views of the law, applicable to this class of cases. It is made *the duty* of the parent or guardian, as we have already shewn, to provide for the maintainance, protection, and education of their children and infant wards; and the presumption of the law is, that they have respectively done so, according to their circumstances and condition in life. The general rule of law is, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has performed it, unless the contrary be shewn. *Hartwell vs. Root*, 19 *John. Rep.* 345. The law presumes that every man, in his private and official character, does his duty, until the contrary is shewn. *Bank United States vs. Dandridge*, 6 *Cond. Rep. Supreme Court U. States*, 445.

It is also a general rule of law, that when a tradesman furnishes an infant with goods on credit, it is incumbent on *him* to shew that the articles furnished were *necessaries*, according to the circumstances and condition in life of such infant, before he can recover the price of the goods so furnished. Parents and guardians are the best judges, as to what are necessaries for their children and wards; and whenever a tradesman furnishes them with articles, in *addition* to what their parents and guardians have provided them, it is incumbent on such tradesman, to shew a *necessity* therefor, to entitle him to recover the price of the articles so furnished. The tradesman trusts the infant at his peril. 2 *Kent's Com.* 239. *Van Vaulkenburgh vs. Watson*, 13 *John. Rep.* 480. *Ford vs. Fothergill*, 1 *Espinasse Rep.* 211. *Bainbridge vs. Pickering*, 2 *W. Blackstone's Rep.* 1325. *Cook vs. Deaton*, 14 *Eng. Law Rep.* 232. *Connally vs. Hull*, 3 *McCord's Rep.* 6. *Mortara vs. Hall*, 6 *Simon's Rep.* 465.

In *Ford vs. Fothergill*, the plaintiff brought an action against the defendant for a coat, waistcoat, and two pair of breeches, which were ordered to be sent to the Grecian Coffee House. Lord *Kenyon*, *Ch. Justice*, said, "Nothing is clearer in the law,

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than that an infant cannot contract a debt, except for *necessaries*. It is absolutely necessary he should have the power of making *that* contract, otherwise he would starve. As to the plaintiff not knowing his fortune, it is no excuse; it was *incumbent on him to inquire into that*, and to *prove it to the Jury*. Whether he was living with his father or not, the person who dealt with him, was *bound to inquire and know who he was*. He was living at a Coffee House, itself no mark of a wary disposition; the plaintiff should have inquired there, and gone to his father and inquired of him, whether he was in want of these clothes."

In *Bainbridge vs. Pickering*, the action was brought to recover the price of certain feathered caps, and other ornamental apparel furnished a young lady by a milliner. In that case, the Court, by *Gould*, Judge, said: "If an infant *lives with her parent*, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessities of life, I apprehend that the child cannot bind herself to a stranger, even for what might otherwise be allowed as necessities, for no man shall take upon him, to dictate to a parent *what clothing* the child shall wear; at what time they shall be purchased, or *of whom*. All that must be left to the *discretion* of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, I think we should give no countenance to *such persons as inveigle young women into extravagance*, under the pretext of furnishing them with *necessaries*, without the previous *consent of the parent*."

In *Connally vs. Hull*, it was held that an infant who lives with, and is properly maintained by her parents, cannot bind herself to a stranger for necessities; and when daughters lived with their mother, it *must be presumed* they were *properly maintained by their parent, until the contrary be proved*; for the mother being the best judge of what is necessary for them, should be consulted before credit be given them. In *Van Vaulkenburgh vs. Watson*, it was held to be the duty of the parent, to furnish necessities for his infant children, and if he neglect that duty, and any other person furnishes such necessities, he is deemed to have

conferred a benefit on the delinquent parent, for which the law raises an implied promise on the part of the parent to pay; but what is *actually necessary*, will depend on the *precise situation of the infant*, and which the *party giving the credit must be acquainted with, at his peril*.

In *Cook vs. Deaton*, the Court held that if proper clothes are supplied to an infant by his father, any others furnished *in addition*, cannot be considered as *necessaries*; and it is the duty of the tradesman, when applied to by an infant for clothes, to make *inquiries of his friends before he gives him credit*.

In *Mantara vs. Hall*, it was held that when an infant has an allowance made to him for his support *by his guardian*, a tradesman is not entitled to be paid for articles supplied to the infant *on credit*, unless he can make out, that having regard to the infant's circumstances and station, *which he is bound to inquire into*, the articles were *necessaries*. In the case under consideration, the record does not disclose whether the defendant's wife *was living with her guardian or not*, at the time the articles in the account were furnished by the plaintiff; but the record does shew, that she had a guardian at *that time*, and that he furnished her "with what he regarded *ample and proper for her support, agreeable to her age and condition*." The Court however, instructed the Jury, that it was *incumbent on the defendant* to shew by evidence, what particular articles were furnished by her guardian to his wife, so that the Jury might judge whether she was furnished with *necessaries* suitable to her estate and condition. So far from it being *incumbent on the defendant* to shew by evidence what particular articles were furnished his wife before marriage, by her guardian, in order to defeat the plaintiff's recovery, the reverse of that proposition is true; as we have already shewn by the authorities. To entitle the plaintiff to recover the price of the articles furnished the infant ward before her marriage, according to the facts disclosed by the record in this case, it was *incumbent on him*, to shew by evidence, what was her estate and condition, and what particular articles of clothing, &c., the guardian did furnish her, so that the Jury might judge whether she was furnished with *necessaries*, accord-

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ing to her estate and position in society; for the plaintiff's right to recover, depends on the fact, that *she was not so furnished*, and that the articles which he did furnish, in addition to those furnished by her guardian, were *necessary* for her *proper* support and maintainance, according to the value of her estate, and her position in society, in the community in which she lived. The only evidence introduced by the plaintiff, to shew that the articles in the bill of particulars were *necessaries*, is contained in the testimony of Isaac W. Stokes, who stated "that the articles were generally such as young ladies of property used in dressing." The same witness also stated, that "he could not say all the things charged in the account were *necessaries*, for he considered some of the articles charged, are *extravagant, even for young ladies of property.*"

The burden of proving the issue of *necessaries* furnished an infant, is on the plaintiff. 2 *Greenleaf's Ev.* §364. Our judgment in this case, must of course, be restricted to the state of facts disclosed in the record before us; and in reference thereto, we assert and maintain the following propositions: that a guardian of the person and property of an infant ward, has the same right to judge as to what are *necessaries* for his ward, according to her estate and position in society, that a parent has for his child; that when it appears that such infant ward has a guardian who has furnished her with such *necessaries* as in his judgment, he regarded ample and proper for her support, according to her age and condition, a tradesman who seeks to recover the price of a bill of articles furnished such infant ward, in *addition* to those furnished by her guardian, must shew to the satisfaction of the Jury, what is the estate and condition of such infant ward, and must also shew what particular articles of necessity the guardian has furnished for his ward, and that the same are *not sufficient* for her support and maintainance, according to her estate and position in society; and that the *additional* articles so furnished by him, were *necessary* for such support and maintainance. In such a case, burden of the proof is on the *plaintiff* and not on the *defendant*. Let the judgment of the Court below be reversed.

No. 72.—WILEY MITCHUM, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] Upon an indictment for murder before the Superior Court in the County of Stewart, the proof was that the crime was committed *in the house of the witness, at Florence, Stewart County: Held*, that it was sufficiently proven that the crime was committed within the jurisdiction of the Court.
- [2.] The indictment charged that *William R. Morris* was murdered by the prisoner, and the proof was that *W. R. Morris* was slain by him: *Held*, that the proof of identity was well left to the Jury, and they having found a verdict of guilty, the verdict ought not to be disturbed.
- [3.] Upon trial, one witness testified, "that prisoner stooped down, and as witness heard a rattling on the floor, and did not see the knife afterwards, he supposed that prisoner picked it up. Prisoner rose with a six barrelled pistol in his hand—presented it at the breast of deceased, not more than six inches distant—took deliberate aim long enough to count ten or fifteen before he fired. He fired the pistol about the right nipple. Deceased brought a groan—his face contracted—fell upon the floor, and in about five minutes expired." *Held*, that the killing was sufficiently proven.
- [4.] A witness testifies that he was some thirty or forty yards from the house when deceased was shot; upon hearing the report of the pistol, he looked towards the house and saw a person that he took to be the prisoner, run out, who ran a few paces and turned and ran again into the house, and immediately ran out again, and ran to where witness stood. He ran slow and awkward, which induced witness to think that he was very drunk. When he came to witness, he seemed greatly agitated and troubled, and at the moment of coming up to him exclaimed, *that he would not have done it for the world*. Witness further testified that one minute would probably cover the time from the firing until the prisoner uttered the exclamation—two certainly would: *Held*, that under these circumstances, the exclamation of the prisoner was admissible as part of the *res gestæ*.
- [5.] Declarations to be a part of the *res gestæ* must be contemporaneous with the main fact, but to be contemporaneous they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and if they are made at a time so near to it, as to preclude reasonably the idea of deliberate design, then they are to be regarded as contemporaneous.
- [6.] If one is killed by another by a pistol shot, and the intention to shoot entered the mind of the slayer but one moment before the firing, this is evidence of express malice, *provided* that there was no assault upon the person killing, or attempt otherwise to do him a violent personal injury by the deceased.

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- [7.] It is error in the Court, when requested to prevent it, to permit counsel to comment on facts in their argument to the Jury not in evidence.
- [8.] It is not competent to ask a witness as to what he had sworn on a former occasion, with a view to impeach him, if his testimony on that occasion is of itself inadmissible in evidence.
- [9.] It is not good ground for a new trial that a Juryman had said before the trial, "if the evidence was as he had heard it, the prisoner was guilty and would be hung."

Indictment for murder, in Stewart Superior Court. Tried before Judge IVERSON. May Term, 1852.

The plaintiff was placed upon his trial under an indictment, charging him with the murder of William R. Morris.

The State introduced *Wayne W. Eilands*, who testified that he was present at the time a difficulty occurred between W. R. Morris and prisoner, on the 1st Monday in October, 1851, at the house of witness, in Florence, Stewart County. Morris was standing at the counter of witness for an hour; had taken three drinks; commenced singing and talking, which caused him to cough and vomit. Prisoner cursed him and said, "God d—n you, if you want to puke, go out of the house;" took hold of him and tried to push him out of the door; deceased caught hold of the door and said "not exactly yet." Prisoner drew a large Spanish dirk and struck deceased on the shoulder; deceased asked him if he was in earnest; prisoner said he was; deceased pulled out his knife and dropped it on the floor; prisoner stooped down, and witness thinks, picked up the knife; prisoner then drew a six barrelled revolver—presented it within six inches of the breast of deceased—took deliberate aim and fired; deceased died in five minutes; prisoner ran out of the house, but was caught and brought back; never saw the prisoner before that day; had no authority in that house; deceased was quite drunk; prisoner was drinking, but not drunk; pistol was self-cocking.

Benjamin Horton, sworn by defendant, testified, that he was present at the time of the killing; prisoner had no difficulty with deceased; prisoner and witness were talking together, and

prisoner was flourishing his pistol about, when it fired; prisoner was then looking at the witness, and appeared alarmed when the pistol fired; prisoner was drunk; the pistol belonged to witness, who loaned it to prisoner the evening before; was very easy on trigger; prisoner and deceased were not acquainted.

Thomas Gilbert, was some thirty or forty yards from the house when the pistol fired; prisoner ran out to where witness was standing; seemed to be drunk, and very much agitated; not over two minutes elapsed from the firing, before prisoner reached witness. Defendant's counsel proposed to prove by this witness that at that moment prisoner said "that he would not have done it for the world," which evidence was ruled out by the Court.

Benjamin Horton, re-examined. The moment the pistol fired, prisoner asked witness "if he had killed him;" witness said he did not know; prisoner said "he would not have done it for the world if he had."

Job C. Patterson (introduced by the State) contradicted *Horton* in some of the *minutiae* of his testimony.

The Jury returned a verdict of guilty. Whereupon defendant moved for a new trial, on the grounds—

1st. That there was not sufficient proof that the alleged crime was committed in the jurisdiction of the Court.

2d. That there was not sufficient proof of the identity of the person represented in the bill of indictment to have been slain, with the person proven on the trial to have been slain.

3d. That there was not sufficient proof that the deceased was slain by the prisoner.

4th. That there was not sufficient proof that the deceased was slain by the prisoner.

5th. That the Court erred in rejecting the evidence proposed to be proven by *Thomas Gilbert*, as above stated.

6th. That the Court erred in charging the Jury that it was evidence of express malice on the part of the defendant to constitute murder, if it appeared that the intention to shoot entered the mind of the defendant only one moment before the firing,

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provided there had been no actual assault on the prisoner by the deceased.

7th. That the Court erred in allowing the Solicitor General, in the concluding argument (although objected to by counsel for the prisoner,) to support the testimony of *Eilands*, by stating that he was an unwilling witness for the State; that he had refused to come under subpoena and was brought by arrest under attachment; none of which was in evidence before the Jury; the Court remarking that it was allowable, because B. K. Harrison, one of the defendant's counsel, had in his argument to the Jury, stated that *Eilands* was locked up on the Sabbath before the trial with the father-in-law of the deceased and the prosecutor, drinking with them, none of which was in evidence, Mr. Harrison contending that *Eilands* was a willing and a bribed witness.

8th. That the Court erred in refusing to permit the witness *Eilands* to be asked the question whether he did not on his examination before the committing Magistrate, swear, "that immediately after the shooting, the prisoner, being brought into the presence of the body of deceased, asked witness if he killed him; witness answered he did; prisoner said, "Lord, I am sorry for it, I did not intend to kill him."

9th. Because Wm. W. Beman, the foreman of the Jury, before he was sworn, had said to Elijah Bostwick, "that if the testimony was as he had heard it, the prisoner was guilty and would be hung;" which fact was unknown to the prisoner until after the trial.

10th. That the verdict is contrary to the evidence.

11th. That the verdict is contrary to law.

In support of the *ninth* ground, defendant's counsel filed the affidavit of *Beman* the Juror, stating, that not being examined on his *voir dire* he had not stated the fact that he had expressed an opinion; that he did express the opinion to Bostwick, but that he was influenced in finding his verdict only by the evidence and the charge. Also the affidavit of the defendant that he was ignorant of this fact until after the trial.

It appeared to the Court that Beman, with a view to deter the counsel from selecting him as a Juror, had said to B. K. Harri

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son, one of defendant's counsel, before the trial, that "he had better not take him as a Juror, as he would hang the prisoner."

The Court refused to grant a new trial on either of the grounds taken, and error has been assigned on each ground.

GAULDING and HARRISON, for plaintiff in error.

Sol. Gen'l. WILLIAMS and JNO. A. TUCKER, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The errors complained of in this case, grew out of a refusal to grant the prisoner a new trial. And first, it is claimed that the presiding Judge erred in refusing a new trial upon the ground that it was not proven that the crime with which the prisoner was charged, was committed within the jurisdiction of the Court. By the Constitution of the State it was triable alone in the County where it was committed, and the Court had jurisdiction over it no where else; to give jurisdiction, therefore, it was necessary to prove that it was committed in the County where the Court was sitting. The Court sat, and the trial was had in the County of *Stewart*, and the proof was that the crime was committed in the house of the witness, at Florence, in the County of *Stewart*. That the Court was sitting in the County of *Stewart* and State of *Georgia*, was a fact known to the Court from its own records and the public law. When therefore it was proven that the crime was committed in the County of *Stewart*, it was proven that it was committed in the County in which the Court entertained jurisdiction over it. *Non constat* that there is in *Georgia* any other County called *Stewart*. There is no use in discussing a question like this. If such an exception were sustainable, it could be done alone by taking leave of common sense, and by yielding the solid virtue of judicial investigation to a distinction too subtle to command the least respect.

[2.] The next exception goes upon the assumption that the proof did not identify the person charged to have been murdered with the person proven to have been slain. The person

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slain, according to the indictment, was *William R. Morris*, and the person proven to have been slain, was *W. R. Morris*. It is claimed that the variance between the allegation as to the person and the proof is fatal.

It is very clear that there must be a killing before there can be murder, and it is equally clear that the prisoner cannot be convicted of murder unless he is proven to have slain the person which the indictment charges him to have murdered. On this indictment for the murder of *William R. Morris*, the plaintiff in error could not be convicted upon proof that he had murdered *John Stiles*. So vital is this, as a practical rule, that its observance substantially, must be insisted upon with strenuousness. It may be conceded that in former times, such a variance would have been held decisive, and even now, we are not altogether satisfied that we are right in not so holding it. We think however, whether *W. R. Morris*, the person slain according to the testimony, was or was not the *William R. Morris* charged to have been slain in the indictment, was a question safely trusted with the Jury. *W. R.* it is true, may represent *Wilson R.* or *Willis R.*; but these letters may also represent *William R.* The Jury had the right to consider the question of identity, not alone in the light of the testimony specially referred to, but also in the light of all the attendant circumstances. They were satisfied with the identity, as is evidenced by their verdict, and we will not disturb it on this account.

[3.] A new trial was asked and refused, on the ground that there was not sufficient evidence that the deceased was slain by the prisoner; and to the ruling on this point the prisoner takes exception. A mere recital of a portion of the evidence, is sufficient to quiet this complaint. The witness *Eilands* says, "Prisoner stooped down, and as witness heard a rattling on the floor, and did not see the knife afterwards, he supposed that prisoner picked it up; prisoner rose with a six barrellled pistol in his hand—presented it at the breast of deceased, not more than six inches distant—took deliberate aim long enough to count ten or fifteen before he fired; he fired the pistol about the right nipple; prisoner ran out and was caught about fifty yards from the house

of witness : deceased brought a groan—his face contracted—fell upon the floor, and in about five minutes expired.”

It is difficult to find in the annals of homicide, the killing proven with such terrible distinctness, and with such tragic certainty. The Jurymen who could doubt, in the face of this testimony, that the deceased was shot dead by the prisoner, must be inconceivably skeptical. It is out of the question to conceive that any one of the Jury that tried this case, could or did doubt. The learned counsel contends that there was no evidence that the pistol was charged with ball ; none of a wound ; none of the flow of blood, and therefore none that the deceased came to his death by the hands of the prisoner. These details are supplied by the most demonstrative generalities, to wit : the proximity of prisoner to the deceased—the deliberate aim at a vital part—the firing—the groan—the contraction of the face—the fall, and the death. It is within the range of possibilities, that this man died from some other cause, and not by the hands of the prisoner ; but so to believe, would be to substitute a miracle for the most irresistible deductions of reason from cause and effect. It is sufficient, if the evidence, whatever be its character, whether positive or presumptive, direct or circumstantial, satisfies the understanding and conscience of the Jury. *Giles vs. The State*, 6 Geo. R. 286.

The 4th exception is but a repetition of the third.

[4.] The rejection of the sayings of the prisoner, as proven by *Thomas Gilbert*, we think was an error, and upon this and one other ground to be noticed in its order, we are constrained to award a new trial.

A well ascertained rule of evidence is, that a party cannot be permitted to manufacture evidence for himself. A consequence flowing out of this rule is that the sayings of a party in his own behalf cannot be proven. There are exceptions to the inadmissibility of such sayings, and however well founded in reason and justice the rule may be, the exceptions are vindicated by both reason and justice. It is however right to guard the rule with severe vigilance, and to admit the exceptions with great caution. Without such a rule it would be competent for every

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criminal to provide for his acquittal, with a very moderate amount of forecast and self-possession, and go "unwhipped of justice;" whilst at the same time, without the exceptions, in some cases, innocence would meet the felon's fate. For example, a man of untarnished life and character is found on the highway with an instrument of death in his hand, reeking with blood, but freshly drawn from the heart of one who is expiring at his feet. With no witness to the transaction, such a man is convicted by the circumstances, and would, by the operation of the general rules of the law, die as a murderer. In the moment of discovery, however, he is heard to exclaim, "I slew him in defence of my life." The admission of these sayings would save the life of an innocent man, whilst their exclusion would consign him to the gallows. The case supposed is an extreme one, and is given for illustration, and not for the purpose of testing the correctness of the ruling in this case. In the language of this Court, in *Monroe vs. The State*, "if we unconditionally refuse to allow a defendant under any circumstances, to have his conduct interpreted by his acts and speech, we shall frequently deliver over the accused a helpless and hopeless sufferer to the penalty of the law." 5 Geo. R. 132. Whenever the sayings constitute a part of the *res gestæ*, they are within the exception and are admissible. We consider that the excluded sayings of the prisoner in this case, were a part of the *res gestæ*. What then is meant by *res gestæ*? I cannot more satisfactorily answer this question than by transcribing what I said on a former occasion. "The idea of the *res gestæ* presupposes a main fact. With this preliminary remark, I answer that the *res gestæ* mean the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. I do not claim that this definition is perfect, for I know that the *res gestæ* are different in different cases. No definition could be found so comprehensive as to embrace all cases; hence it is left to the sound discretion of the Courts what they shall admit to the Jury along with the main fact, as parts of the *res gestæ*. But perhaps this definition embraces as nearly all that is meant in legal parlance by

that phrase as any other that can be drawn from the books. One peculiarity of the main fact or transaction ought to be noted, and that is that it is not necessarily limited as to time—it may be a length of time in the action. The time of course depends upon the character of the transaction; it is however, well settled, that the acts of the party, or the facts or circumstances, or declarations which are sought to be admitted in evidence are not admissible, unless they grow out of the principal transaction, illustrate its character and are contemporary with it.” Again I say, “Declarations as parts of the *res gestæ*, made at the time of the transaction, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. An indispensable characteristic of declarations is that they must be made at the time of the act done, which they are supposed to characterise; and further, they must be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonise with them as obviously to constitute one transaction.” 3 *Kelly*, 517, 518. As applicable to this case, I refer also to a proposition stated by Judge Lumpkin, in his opinion in *Monroe vs. The State*. It is this, “When an act is done to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from which the motive may be collected, is a part of the *res gestæ*.” 5 *Geo. Rep.* 85. In determining questions about the *res gestæ*, it is an error to undertake to test them by a definition or rule. For what is the *res gestæ* of a given transaction must depend upon its own peculiarities of character and circumstances. Courts must be allowed some latitude in this matter. *Rawson vs. Haigh*, 2 *Bing.* 104. *Ridley vs. Gyde*, 9 *Bing.* 349, 352. *Pool vs. Bridges*, 4 *Pick.* 379, 11 *Pick.* 309.

Adjudicated cases, determined by able Courts, are safe guides; and when not to be found, like that which is before us, we are left to apply to it the principles which the rule embraces, irrespective of the rule itself. In applying these, let us inquire what is required to bring a declaration within the exception of the *res gestæ*. They must grow out of the main fact—they

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must serve to illustrate it, and they must be made contemporaneously with it. When these things are true of declarations, they are provable, not as the testimony of the declarant, but as partaking of the nature of facts. They derive their credibility not from his veracity, but from their relation to the transaction out of which they spring. Made at the same time with the main fact—evoked by it without premeditation, and for that reason explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable—as reliable as the fact itself, and would derive no enhancement of their credibility from the oath of the declarant. Such I take to be the philosophy of the *res gestæ*, so far as constituted of declarations. The weight which they are to receive at the hands of the Jury, will depend upon the closeness and fullness of their relation to the transaction out of which they spring; their proximity in point of time to it, and the strength of the light which they shed upon it. The *motive* with which an act is done is frequently the point of inquiry to which the attention of Courts is directed. To ascertain that, contemporaneous declarations are admissible, "Where a person, (says *Prof. Greenleaf*,) does any act material to be understood, his declarations made at the time of the transaction and expressive of its character, *motive* or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts." *Greenleaf's Evid.* §108. With these principles in view, we come to the immediate question made in this record. The transaction or main fact here is the killing—it is the mind or motive with which the prisoner was actuated when he slew the deceased, that was to be ascertained. The great inquiry in this case, (as in all cases of murder,) was whether the killing was with malice, express or implied. Now if the declarations of the prisoner grew out of the killing, and was, according to the construction of the rule which I shall give, contemporaneous with it, and tend to disprove malice, then they illustrate or explain the fact of the killing, and are admissible. Adverting to the declarations, it seems that the witness was within thirty or forty yards of the house when the deceased was

shot. Upon hearing the report of the pistol, witness looked towards the house and saw a person that he took to be the prisoner run out—who ran a few paces and turned and ran again into the house, and immediately ran out again, and ran to where witness was standing; he ran slow and awkward, which induced witness to suppose he was very drunk; when he came to witness, he seemed greatly agitated and troubled, and at the moment of his coming up to him, he exclaimed “that he would not have done it for the world.” *Gilbert* further testified that “one minute would probably cover the time from the firing until the prisoner uttered the exclamation, two certainly would.” For a full understanding of the point, I have detailed the testimony of *Gilbert* with a little more minuteness than it is found in the Reporter’s brief. The most important matter to be considered is the *time* that elapsed between the killing and the utterance of the rejected exclamation; that was from one to two minutes. Probably, says *Mr. Gilbert*, one—certainly, not more than two. Take the medium time between one and two, and it is one and one-half. The agitation of the prisoner is to be noticed—also the fact that no one was in pursuit of him; no attempt had been made at the time that he spoke to the witness to arrest him; no one present at that moment had spoken to him. His coming to where the witness was, seems to have been voluntary, and the exclamation spontaneous. The meaning of the exclamation is also important. The natural interpretation of it, seems to me to be the expression of profound regret or remorse; such as a man would feel after unintentionally killing a fellow-creature. Upon the hypothesis that the killing was not a deliberate murder, but the result of a reckless, drunken bravado use of a hair-trigger, self-cocking revolver, (and the defence seems to have been put chiefly on this ground) this interpretation is a fair and natural interpretation. It is true, that such an exclamation, made after the fact, might be the deliberate and studied fabrication of guilt, made with a view to an acquittal. I must believe, however, that the circumstances do not warrant this construction, and that the former interpretation is most reasonable. The short period of time that had inter-

vened, and the agitated manner of the prisoner, forbid the idea of deliberate design ; he can scarcely be supposed within, ninety seconds from the fall of his victim, to have deliberated with himself upon the expediency of such a declaration ; he cannot be necessarily believed to have in fact so deliberated, because his running out of the house immediately after the firing, and then back again, and then out again, and his distressed and agitated appearance when he reached the witness, exhibit a state of mind incompatible with such a belief. Nor do I believe that such an exclamation would readily or naturally escape from a man who had but just satisfied the demands of a murderous malice. Such a man, at such a moment, would most naturally in his heart, exult in the very fiendishness of the act. Remorse would not, in the very moment of gratified vindictiveness, be the feeling of such an one ; and not feeling, he would not be likely to express it. Such being the most probable meaning of the declaration, does it not spring out of the act ? It seems to me that it is its legitimate fruit, and bears as necessary a relation to it as an immediate effect bears to a cause. Not only so, but it serves to illustrate it. It sheds light upon the question of malice—upon the motive, or which is the same thing, the want of motive, under which the prisoner acted ; that is to say, it serves to explain the killing, by showing that it was not his intention to kill, and thus rebuts the implication of malice. To what extent it will go, if to any, when considered in connection with all the testimony in the case, is for the Jury to determine. My purpose in all that I have said, is to bring these declarations within the rule of the *res gestæ*. I mean to express no opinion as to the guilt or innocence of the prisoner.

[5.] The requirement of the rule farther is, that the declarations be *contemporaneous* with the transaction. Now, where the books say—when this Court has said—that the declarations must be contemporaneous with the act, or when they or this Court say that the declarations must be made *at the time* of the act ; it is not to be understood that we or the books assert that declarations are never to be admitted unless their utterance is exactly coincident in point of time with the act. Declarations,

in the legal sense of the word, may be *contemporaneous* with the act, when they precede or follow the act; and when they are to be admitted and when rejected, if not coincident with the act, is a question for judicial discretion, of embarrassing nicety—one which must depend upon the application of the principle upon which the rule is founded, and which I have endeavored to state, to the circumstances of each case. If the declarations appear to spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and if they are made *at a time so near to it, as* reasonably to preclude the idea of deliberate design, then are they to be regarded as contemporaneous. Amplification cannot make the view which I have of this point plainer, and I shall therefore leave it here, referring to a few authorities to sustain the position that to be contemporaneous, declarations are not always required to be exactly concurrent with the act.

In *Rawson and another vs. Haigh et al. Park, J.* says, "it is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying that a declaration made a month after the fact, would itself be admissible. But if, as in the present case, there are connecting circumstances, it may even at that time form a part of the whole *res gestæ*." 2 *Bing.* 99. See also 14 *Serg. and Rawl.* 275. 4 *Pick. R.* 378. 21 *Howell's St. Tr.* 542. 1 *Starke R.* 353. 1 *Metc.* 247. 9 *Bing. R.* 349. *Reynolds' case*, 1 *Kelly*, 230. 5 *Geo. R.* 85. In this case the intervening time being only one minute and a half, and all the circumstances precluding the idea of deliberation, we are satisfied that proof of the declarations ought to have been admitted.

[6.] The bill of exceptions represents the presiding Judge as having erred in charging the Jury, "that if the intention to shoot entered the mind of the defendant only one moment before the firing, it was evidence of express malice, *provided* there had been no actual assault on the prisoner by the deceased." Whether this was a case of express or implied malice, or neither, we are not called upon to decide. The instruction I am now

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considering, was warranted by the evidence; indeed the plaintiff in error does not claim that it was not. He contends that admitting the facts to be as the presiding Judge states them, the proposition is not good law. We differ with the learned counsel for the plaintiff in error. Express malice, by our code, is "that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof." *Prince*, 622. Deliberate intention to take life unlawfully is the prime element of express malice. This intention must be manifested by external circumstances capable of proof. Previous threats, ancient grudges and way-laying, are the external circumstances usually referred to, to illustrate a case of express malice. The strength and clearness of such illustrations sometimes have the effect of excluding from our consideration other circumstances susceptible of proof, which demonstrate a deliberate intention to kill. The charge of the Court excludes an actual assault by the deceased on the prisoner, and properly, for in that event the killing would be manslaughter. If there is no assault and no attempt on the part of the person killed to commit a serious personal injury on the person killing, and the intention to shoot entered the mind even a moment before the firing, and the slayer does shoot, and the effect of the shot is death, I can see no reason why a deliberate intention to kill is not manifested by the circumstances. In the absence of all provocation, by assault or otherwise, to rise up—draw a pistol, and in one moment discharge its contents into the breast of his neighbor, the intention to *shoot* at the very moment of firing, would be manifest by the circumstances, all of which would be capable of proof by eye-witnesses, and the *deliberate intention* to kill would be demonstrated by the proven circumstances. Whether there was no assault, and whether there was an *intention* to shoot, are questions for the Jury. Were we satisfied that the Court erred in this charge, we would not send the case back on that account, because, if the case put by the Judge be not a case of express malice, it is of implied, and the consequences would be the same in either event to the prisoner.

[7.] The seventh exception is founded on the refusal of the

Court to restrain the Solicitor General, although requested so to do, by counsel for the prisoner, from commenting on facts not in evidence, in his concluding speech to the Jury. This we think was an error. We have had occasion to consider the habit of counsel in addressing the Jury, of commenting upon matters not proven and not growing out of the pleadings before, and have been content with visiting it with a decided and emphatic disapproval. *Berry vs. The State*, 10 Geo. 522, 523. We entertain no shadow of doubt, as to the necessity of pronouncing it as we now do, illegal and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the Court. It is the duty of the Court to prevent such comments, and in all cases where this is not done, provided the Court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial. There was, it is true, some excuse for the license conceded to the *Solicitor General* in this case, in the fact that counsel for the prisoner had already taken the same liberty in his argument to the Jury. The *Solicitor General*, no doubt, felt called upon by the obligations of his office, to remove any wrong impression which the argument of counsel for the prisoner had made as to the credibility of the witness. Disregarding, however, these things, we have no option but to make this case the occasion of establishing a rule upon this subject. In doing this, I am sure that it is scarcely necessary to say that we disclaim any purpose of inflicting a personal censure upon the able and upright Judge who presided in the cause, or upon the counsel and the prosecuting officer. If no other reason existed for this disclaimer, (and there are many) sufficient reason would be found in the usage of our Courts, which has gone very far to sanction the habit referred to. Its practical tendency is bad upon the Court, the bar and the Jury. If this were all, perhaps our duty would stop with the expression of such an opinion; but this is not all—for in our judgment it is violative of the rights of the citizen litigant in the Courts of justice; and if so, we are not at liberty to stop short of making it cause for a new trial. It is not foreign to the subject to say that it is the duty of counsel to guard, by the most

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scrupulous propriety of demeanor, in the conduct of a cause, the dignity and honor of the profession. Connected as it is, most intimately, with the administration of justice, it should be protected most vigilantly from falling into popular disrepute. It ought, as I verily believe it does, to command the respect of the wise, and the reverence of the good. Power and place—hereditary wealth—stupidity in high social position, and even genius, pandering to a popular taste for caricature; jealous of the power which it wields upon governments, have labored to degrade it. Still in this country and in England, if no where else, the bar is the ladder upon which men mount to distinction; the lawyer is the champion of popular rights; the class to which he belongs is more influential than any other; and counsel, yes, feed counsel, is indispensable to a fair and full administration of justice. When learning and character, and practised skill, and eloquence, and enthusiasm, chastened by discretion, are enlisted in behalf of the litigant, he may rest assured that he holds in his counsel the very best guarantee against all forms of wrong and oppression in the administration of the law. It is true, that he is paid for his services—and what of that? (Are not Princes and Premiers, Presidents and Priests also paid?) One thing never yet was bought with money, and that is the soul-engrossing identification of counsel with his client. It is the gratuitous bestowal of his sympathy, drawing forth the masterly powers of his genius and the rich treasures of his learning, that makes the great lawyer, the honored and influential citizen. The approval of conscience and the respect of good men are his reward; far richer than the stipulated fee of these days, or the *honorarium* of the Roman advocate. If I thus magnify the office of the counsel, it is for the purpose of saying that its very importance makes indispensable the exclusion of the habit which we now condemn. But I proceed, claiming the indulgence on account of these general remarks, of the critical professional reader, to test the rule we lay down by strictly legal considerations. That rule is, that it is contrary to law for counsel to comment upon facts not proven. He represents his client—he is the substitute of his client; whatever the client may do in the conduct of his

cause, therefore, his counsel may do. In relation to his liberty of speech, the largest and most liberal freedom is allowed, and the law protects him in it. The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is wide—very wide. He is entitled to be heard in argument upon every question of law, that may arise in the cause; in his addresses to the Jury it is his right to descant upon the facts proven or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when that is impeached by direct evidence, or by the inconsistency or incoherence of his testimony, his manner of testifying, his appearance, or by circumstances. His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination. To his freedom of speech, however, there are some limitations. His manner must be decorous. All Courts have power to protect themselves from contempts, and indecency in words or sentiments is a contempt. This is a matter of course in the Courts of civilized communities. Nor is it matter of form merely; for no Court can command from a civilized public that respect which is necessary to an efficient administration of the law, without maintaining in the business of the Court that courtesy, and dignity, and purity, which characterize the intercourse of gentlemen in private life. It has been found difficult to prescribe a legal limitation to the lawyer's liberty of speech in the performance of his duties in a cause. That the discussions should be *free* is perfectly obvious; and even abuses should be tolerated, rather than a privilege so valuable should be abridged. We feel the delicacy of the ground upon which we tread, and are solicitous of being understood as carrying our present ruling no farther than to cover the precise question made in the assignment. The British Courts have not found themselves free from embarrassment on this head. In the leading case upon this subject, it was settled that

counsel is not liable to an action for words spoken in a judicial proceeding, provided they are *pertinent* to the cause, and spoken without malice; and this seems to me, after a careful examination, to be the nearest approach to a definite limitation upon the right of speech in Court to be found in the English books. It is clearly a vague and fluctuating rule, for what is *pertinent* is wholly uncertain, depending upon the idea which the Court who tries the suit against the counsel, may entertain of *pertinency*, and upon the various character of cases and circumstances, in which, and under which the objectionable words may have been uttered. In the case referred to, Lord *Ellenborough* said that "an advocate was entitled to use the information communicated to him by his client in a fair and *bona fide* exposition of the merits of the case submitted to his conduct; he was privileged in commenting on the case and making observations on the instruments or agents by whom the case was brought into Court. This privilege belonged to him, and might be exercised with a large and liberal freedom." *Bayley, J.* adopted the rule laid down in *Brooke vs. Sir Henry Montague*, in *Cro. Jac.* 90, and quoted it as follows, "that a *counsellor at law*, retained, hath a privilege to enforce anything that is informed unto him for his client, and to give it in evidence, it being *pertinent* to the matter in question, and not to examine whether it be true or false, but it is at the peril of him who informs it. For a *counsellor* is at his peril to give in evidence that which his client informs him, being *pertinent* to the matter in question. Otherwise an action on the case lies against him by his client, as *Popham* said, and although it be false, he is excusable, being *pertinent* to the matter." *Abbot, J.* said, "that the rule of determining whether this action was maintainable against a *barrister*, must be governed by the *pertinency* of the words to the matter in issue." Opinion to the same effect was expressed by *Holroyd, J.* So that it would seem that in the maintenance of his client's cause, counsel is free to do or to say anything that is *pertinent* to the matter in question, and that he takes the hazard of his words and actions being *pertinent*. *Hodgson vs. Scarlett*, 1 *Holt, N. P. C.* 621, 622, 623, 624. 3 *Eng. C. L. Reps.* 243, 244, 245. (*Cro.*

Jac. 90. 1 *Hawk.* 73. *S.* 8. 1 *Saunders*, 132. 4 *Colce*, 14 *B.* 1 *B. & A.* 232. 3 *Black. Com.* 29. I adduce this rule and quote these authorities, in order to say that they sustain our judgment, because statements of facts not proven, and comments thereon, are outside of a cause; they stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel.

But farther; every person accused is entitled to be tried by a Jury, and according to the laws of the land. This is the greatest of all the privileges conferred by *Magna Charta*, and it is guaranteed by our own fundamental law. Now I assume that this privilege is violated, if counsel are permitted to state facts and comment upon them in argument against the adverse party, which are not before the Jury by proof regularly submitted. The accused is not only entitled to have a trial by a Jury of twelve men, but he is entitled to have his trial conducted according to the course and usage of the Common Law. "By the law of the land," as used in the great Charter, has been understood due proof of law, that is, indictment or presentment; but that is not now the only meaning of these words. They mean that the party charged, shall be indicted, arraigned and tried according to the rules of law and the established usages of the Courts. Trial by Jury! how imperfect a privilege would that be, if the forms of law were abandoned—if the rules of evidence were disregarded! An essential element in the trial by Jury is that their verdict shall be rendered according to the facts of the case, legally produced to them. They are sworn to give their verdicts according to *evidence*, and if they find without evidence, or against evidence, a new trial will be granted.

They cannot even render a verdict upon knowledge within their own breasts; but if a Juryman has knowledge of facts pertinent to the issue, he may be sworn. The law, with great carefulness, prescribes rules by which facts are to be submitted to the Jury. Testimony must be relevant—the best evidence the nature of the case admits must be produced; hearsay is excluded; interest in the witness will disqualify, &c.; and by our own Constitution, in criminal cases the witnesses are to be con-

fronted with the prisoner. He has in all cases the right of cross-examination. All these and many more rules are prescribed for the ascertainment of the truth of those facts upon which verdicts are to be rendered. The law to be administered may depend upon the facts proven. *Ex facto oritur jus*. "And if the fact (writes *Blackstone*,) is perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial; and in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of *probation* or *trial*, which the law of the country has ordained for a criterion of truth and falsehood." 3 *Black. Com.* 330. When counsel are permitted to state facts in argument and to comment upon them, the *usage* of the Courts regulating trials is departed from, the ~~laws of evidence are violated~~, and the full benefit of trial by Jury is therefore denied. It may be said in answer to these views, that the statements of counsel are not evidence; that the Court is bound so to instruct the Jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in any degree influence the finding, the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt, the Jury have nothing to do with them, and the lawyer no right to make them. And just here, the argument might be rested. It is not reasonable to believe that the Jury will disregard them. They may struggle to disregard them; they may think that they do disregard them, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of counsel, his skill and adroitness in argument, and the naturalness with which the statements stand connected with other facts and circumstances in the case. To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath—without cross-examination, and irrespective of all those precautionary rules by which competency is tested.

In this case, the statements and comments had reference to

the character and credibility of the witness. I know of no rule of law which authorizes the credibility of a witness to be impeached or fortified thus. The manner of attacking or defending the character of a witness is fixed by law; and fixed, among other things, that he may not be subject to irregular and irresponsible assaults upon his veracity and fairness. He, as well as parties and counsel, has rights which it is the duty of the Court to protect. It were a cruel injustice to permit his character to be driven to and fro like the shuttlecock, by the outside statements of counsel. Where shall the license stop? If allowed against the credibility of a witness, then with equal reason they are to be allowed as touching the merits of the issue. If crimination is granted, recrimination cannot be refused. If statements on one side are permitted, counter-statements on the other cannot be denied. If allowed to men of the highest honor, they cannot be denied to those few to be found in all professions destitute of all honorable principle. The *concession*, carried out in its legitimate consequences, would convert the stern, inflexible law and order of a Court of Justice, into confusion, uncertainty and injustice. All these objections apply alike to criminal trials and civil actions—to the prosecuting officer and to counsel.

[8.] There was no error in the Court's refusal to permit the witness, *Eilands*, to be asked, "whether he did not swear before the committing Magistrates, that immediately after the shooting, the prisoner being brought into the presence of the body of deceased, asked witness if he killed him; witness answered he did, and prisoner said, "*Lord, I am sorry for it, I did not intend to kill him.*" If this testimony of *Eilands*' was sought to be re-produced, to get in the declarations of the prisoner, then it was illegal, for several reasons. He might have been examined, if the declarations were admissible, directly as to them. They were not admissible, because it did not appear what length of time had intervened between the killing and the declarations. The Court had no data upon which to determine whether they were part of the *res gestæ*. The word *immediately* is too indefinite for this. If the question was proposed for the purpose of laying the foundation to impeach the witness, then

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it was properly rejected ; because such foundation cannot be laid, by invoking testimony of a witness upon a former occasion, in itself illegal.

[9.] The opinion expressed by the Juryman, *Beman*, was not such as to invalidate the verdict ; because it was hypothetical. *If*, said he, *the testimony was as he had heard it, the prisoner was guilty, and would be hung*. This declaration indicates no settled conviction of his own ; no passion or prejudice. It leaves the mind free to determine according to the evidence. That this is true, is sustained by the affidavit of the Juryman, who swears that he was influenced in making up his verdict, alone, by the evidence and the charge of the Court.

We regard his statement to *Mr. Harrison*, as a device to evade service on the Jury ; one which is becoming but too frequent, and meriting not only censure, but in a proper case, punishment.

Let the judgment be reversed.

NO. 73.—WILLIAM RUSHIN, plaintiff in error, vs. SHIELDS & BALL, defendants in error.

- [1.] Where a deed is recorded, which is not required by law to be recorded, a certified copy from the records would not be evidence.
- [2.] If a deed is improperly admitted to record, the proof of its execution being insufficient, the record copy of said deed cannot be legally read in evidence.
- [3.] The irregular registration of a deed, is not even notice.
- [4.] The omission to state in the *probate* of a deed, that it was *delivered*, is not essential.
- [5.] If a deed be signed and sealed, and declared by the grantor in the presence of the attesting witnesses, to be delivered as his deed ; it is an effectual delivery, provided there be nothing to qualify the delivery, notwithstanding the grantee was not present, nor any person in his behalf, and the deed remained under the control of the grantor.

- [6.] The delivery of a deed may be inferred from its possession by the graantee, or from his possession of the land under the deed.
- [7.] Where an original execution has been lost or destroyed, a copy should be established, and not an *alias fi. fa.* issued.
- [8.] An *alias fi. fa.* can only, under the laws of this State, issue upon the revival of a dormant judgment.
- [9.] If an execution creditor, having the *oller* lien upon the fund in the Sheriff's hands, allows it by his *consent* and *direction*, to be applied to a *younger fi. fa.* to the prejudice of *third persons*, it will be considered an extinguishment *pro tanto* of the creditor's lien; and it matters not, under which execution the money was raised and brought into Court.
- [10.] It is error in the presiding Judge, to state to the Jury, what has or has not been proved.

Claim, in Stewart Superior Court. Tried before Judge IVERSON, April Term, 1852.

A *fi. fa.* in favor of Shields & Ball vs. G. H. Croxton, was levied on a tract of land in Stewart County, to which William Rushin interposed a claim. Upon the trial, the plaintiffs in *fi. fa.* offered in evidence, a copy deed from John Stanton to James Moore; to which plaintiff's counsel objected, on the ground that the probate thereof was not sufficient to authorize its registry; the subscribing witness swearing, "that he saw John Stanton sign and seal the deed, and for the purposes therein named; and that he also saw Duke Hamilton and W. A. Mott, as witnesses to the same." The Court admitted the deed, and this is the first error assigned.

Plaintiff in *fi. fa.* then proposed to read in evidence a copy of a deed from M L. Brown to G. H. Croxton, to which claimant's counsel objected, on the ground that the probate thereof, was insufficient to authorize its registry, the subscribing witness swearing, "that he saw M. L. Brown assign the within deed, and that E. D. H. assigned with him at the same time, as a subscribing witness." The Court admitted the deed, and this is assigned as error.

Plaintiff in *fi. fa.* then proposed to read in evidence an *alias fi. fa.* (under which the levy had been made,) issued by F. D. Wimberly, Clerk of the Inferior Court of said County, on the

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— day of July, 1846, in lieu of an original, alleged to have been lost; also, an order passed by the said Inferior Court, at its July Term, 1846, requiring the Clerk to issue an *alias fi. fa.*,

Counsel for claimant objected to this *alias fi. fa.* on the ground that a copy of the lost original should have been established, as provided by the Statute; and that the Inferior Court had no authority to order an *alias fi. fa.* issued. The Court overruled the objection, and this decision is assigned as error.

The claimant proved by one Daniel Matheson, that he, as Sheriff, in 1842, raised a large sum of money from the property of Croxton, under a certain *fi. fa.* against him, and that the owner and assignee of the *fi. fa.* now levied, notified him, as Sheriff, to hold up the money so raised, as he claimed it, under this *fi. fa.*; that he did so hold it up, and afterwards, by the instructions of the assignee, paid out the fund, (\$80 or \$100) to others. The Court, in its instructions to the Jury, charged them, "that forasmuch as the *fi. fa.* in favor of Shields & Ball was not levied, and did not raise and bring this fund into Court, but the same was raised under a junior *fi. fa.*, the payment of the money by Matheson, under the instructions of the assignee of this *fi. fa.* did not amount to a payment or satisfaction *pro tanto*, of this *fi. fa.* To which charge counsel for claimant excepted, and has assigned the same as error.

Some time after the Jury returned, one of them came into Court with the Bailiff, and stated to the Court, that he and his fellow Jurors disagreed as to whether the Shields & Ball *fi. fa.* had been levied at the time the money was raised, about which Matheson testified. Whereupon, the Judge told the Juror, that there was no evidence introduced, going to show that the execution of Shields & Ball had been levied, and brought the said fund into Court. To which proceeding by the Court, claimant by his counsel excepted, and has assigned error thereon.

B. H. WORRILL, for plaintiff in error.

JOHN A. TUCKER and HARRISON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] William Shields and John F. Ball, comprising the firm of Shields & Ball, holding an execution against Gideon H. Croxton, caused the same to be levied on the south half of lot No. 7, in the first section and 33d district of what was originally Lee County, containing $202\frac{1}{2}$ acres. The land was claimed by William Rushin. Plaintiffs in *fi. fa.* read in evidence on the trial, a duplicate plot and grant, from the State of Georgia, to one John Stanton, for the premises. They then offered and proposed to read a copy deed from John Stanton to James Moore, to the lot of land. Claimant objected to the testimony, on the ground that the probate was defective in this that, Henry B. Meshom, the subscribing witness, upon whose affidavit alone, the deed was admitted to record, did not testify to the *execution* of the instrument. He swore merely, that he saw John Stanton, the feoffer, *sign* and *seal* the conveyance, for the purposes therein named; and that he saw likewise, Duke Hamilton and William A. Mott, the other attesting witnesses, subscribe their names as such. He does not depose to the *delivery* of the deed. The Court overruled the objection, and permitted the paper to be read to the Jury. And this constitutes the first assingment of error.

There can be no doubt, we apprehend, that where a deed is recorded, which is not required by law to be recorded, a certified copy from the records, would not be evidence under the Statute making certified copies from the record of deeds evidence.

[2.] The same result would follow, where the instrument was required by law to be recorded, but the record was actually made without authority. As for instance, by the laws of this State, a deed executed in the presence of, and attested by a Notary Public, Judge of the Superior Court, Justice of the Inferior Court, or of the Peace, and by one other witness, is authorized to be admitted to record. But suppose the registration was made upon the attestation alone of the Magistrate, would it be pretended that a certified copy of such a deed, the original being

lost, could be read in evidence in the Courts of this State? Most assuredly not.

[3.] Indeed, we hold the general principle to have gone to the entire extent, although there may be some respectable authority the other way, that an irregular registration of a deed, is not even notice. *Heister vs. Fortner*, 2 *Binney*, 44. *Hotson vs. Britts*, 3 *Cranch*, 140. *DeWitt vs. Moullton*, 5 *Shep.* 418. *Giddings vs. Smith*, 15 *Verm.* 344. 1 *Watts*, 322. *Tid.* 31. 2 *Conn.* 527. 3 *Day*, 508. 2 *Mason*, 117. 10 *Pick.* 172.

[4.] But the precise question here is, whether the omission to state in the probate of a deed, that it was *delivered*, or words tantamount to that, is essential; it having been, in fact, delivered and registered. We are inclined to think, not without some misgivings, I admit, on my part, that a probate without proof of delivery, is neither a literal nor substantial compliance with the requisitions of the Statute. Where a deed is not witnessed officially, as authorized by the 32d section of the Registry Acts, (*New Digest*, 172,) it must be "*proved*" by one or more of the subscribing witnesses. Is the mere statement upon oath, that the conveyance was *signed and sealed*, proof of its *execution*? Delivery is essential to the true execution of a deed. It would seem, therefore, that proof of delivery was necessary, before it could be legally recorded.

[5.] It has been held, that if a deed be signed, sealed and declared by the grantor, in the presence of the attesting witnesses, to be delivered as his deed; it is an effectual delivery, if there be nothing to qualify the delivery, notwithstanding the grantee was not present, nor any person in his behalf, and the deed remained under the control of the grantor. 4 *Kenl's Com.* 5th edition, 456, (*note a.*)

Had the proof of Mesham gone to this length, it would have been sufficient. It is true, that in the attestation clause, it purports to be delivered, and this, it might be argued, was equivalent to a formal declaration of delivery by the grantor. But it purports to have been signed and sealed also. If one of the requisites, namely, that of delivery, may be dispensed with, why not either or both of the others?

[6.] The delivery of a deed may be inferred from its possession by the grantee, or from his possession of the land under the deed. But that does not meet the difficulty. If the deed was insufficiently proven, it was improperly admitted to record; and *therefore*, the record, or copy of said deed, could not be legally read.

Plaintiffs next read in evidence a copy deed from James Moore to Morgan L. Brown, to the land, and tendered a deed from Brown to Croxton, the defendant in execution, which the claimant objected to also, on account of the defect in the probate. Henry Johnson, one of the attesting witnesses, swore that he "saw Brown *assign* the within deed, and that Edmund D. Holdridge *assigned* with him at the same time, as a subscribing witness." The objection was overruled, and the testimony permitted go to the Jury.

If the Court erred in suffering a copy from the record of the lost deed to be read in evidence, there can be no question as to this, the probate being still more defective in this case than the former.

This mode of admitting copy deeds from the records, is a very great relaxation of the Common Law rule, and has been productive of endless frauds in this State. And while a rigid practice or construction would work inconvenience, still it may not be amiss to remit parties to original proof, where the requisites of the Statute have not been complied with.

[7.] The plaintiff then offered to read to the Jury an *alias fi. fa.* under which the levy had been made, issued by Frederick D. Wimberly, Clerk of the Inferior Court of Stewart County, in January, 1846, in lieu of an original execution, alleged to have been lost or destroyed, pursuant to an order passed at the July Term, 1845, of said Court. This evidence was objected to, on the ground that the original *fi. fa.* was issued by John S. Yarborough, former Clerk of the Inferior Court, in 1839, upon a judgment obtained in said Court, at the November Term, 1839. And it was insisted that a copy should have been established, instead of issuing an *alias fi. fa.* But this objection was overruled, and the testimony allowed.

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[8.] We are clear, that under our Statutes, this *alias execution* could not properly issue. In England, the writ of *fi. fa.* is not executable, after the time to which it is returnable, unless kept open by special order of the Court. Here, it need not be renewed, until the money can be made, provided it be kept alive by the proper entries. If the original be lost or destroyed, a *copy* should be established, under the rules of Court. If the execution becomes dormant for the want of any action within seven years, and the judgment has to be revived, in that case an *alias execution* would issue. The proceeding is, in that event, similar to that at Common Law, where the money has not been made by the return term of the *fi. fa.*—otherwise, a *copy* only should issue in lieu of the original.

But the *alias execution* having issued in this case, by order of a Court of competent jurisdiction, it cannot be collaterally attacked and set aside, while the judgment of the Court stands.

The plaintiffs having closed their case, claimant introduced one Daniel Matheson, who swore that he was Sheriff of Stewart County, in 1842, and in that character, raised a large sum of money by levy and sale of Gideon H. Croxton's property; and that William A. Fort, the assignee of Shields & Ball, notified him to hold up the money on account of his lien, which was the oldest against the defendant; that in compliance with this notice, he did retain the money, until sometime afterwards, when, with the consent, and by the instructions of Fort, he appropriated eighty or a hundred dollars of the fund.

[9.] Claimant exhibited his title to the Jury, and the testimony being closed, the Court charged the Jury, among other things, that forasmuch as the money was not brought into Court by the execution in favor of Shields & Ball, but under a junior *fi. fa.* that the payment of the eighty or a hundred dollars to the junior lien, by Matheson, under the instructions of Fort, did not operate as a credit, *pro tanto*, upon the older lien.

In our judgment, this instruction is directly in the teeth of the decision of this Court in *Newton vs. Nunnally*, 4 Geo. Rep. 356.

[10.] After the Jury had retired to their room, one of the body

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returned into Court with the Bailiff, and announced to the Judge, that he and his fellow Jurors disagreed, as to whether the execution of Shields & Ball had been levied on Croxton's property and raised and brought the fund into Court, concerning which Matheson testified; *Cathy*, the Juror, maintained that it had been levied, but his fellows were of a contrary opinion. He asked the Judge how the fact was; who stated that there was no evidence introduced upon the trial, going to show that the execution of Shields & Ball had been levied, or had brought the fund into Court. To which declaration of the Court, counsel for the plaintiff excepted. See the Act of 21st February, 1850, *Cobb's Digest*, 462.

No. 74.—MARTIN W. STAMPER, Jr. and B. O. KEATON, plaintiffs in error, vs. THE STATE OF GEORGIA.

[1.] Where the securities of one charged with a criminal offence, surrender their principal in open Court, in discharge of their liability, as provided by the Act of 1831, the Solicitor General is not entitled to charge *commissions* on the amount of the bond or forfeited recognizance, but is only entitled to charge the fee of *five dollars*, as prescribed by the Act of 1839, and *no more*.

[2.] All officers charging costs, and exacting its payment from the pocket of the citizen, must always shew the *authority of the law* to do so.

Motion, in Baker Superior Court. Decision by Judge WARREN, April Term, 1852.

The plaintiffs in error became bail in a recognizance for the appearance of Martin W. Stamper, Jr., who was charged with an offence in Baker Superior Court. A *sci. fa.* having issued against them to show cause why judgment should not be entered upon the recognizance, they surrendered the body of their principal

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in open Court, and moved an order of discharge. At the same time, the Solicitor General moved for leave to enter judgment for all the costs which had accrued up to that time, and the additional sum of fifty dollars ; being five *per cent.* upon the amount of the bond, as commissions to the said Solicitor General, for collecting the same.

The Court granted the motion of the Solicitor General, and the same (so far as relates to the fifty dollars as commissions) is excepted to, and assigned as error.

STROZIER, for plaintiff in error.

Solicitor General LYON, (represented by DUDLEY,) for the State.

By the Court.—WARNER, J. delivering the opinion.

[1.] The securities in this case, surrendered their principal in open Court in discharge of their liability, on a forfeited recognizance, as provided by the 3d section of the Act of 1831, and the question made by this record is, whether the Solicitor General has the legal right to tax them with the payment of five per cent. commission on the amount of the bond, and to collect the same, as a *condition precedent* to their discharge from liability on such bond or recognizance?

The Court below held that the securities should pay to the Solicitor General fifty dollars, before they were entitled to be discharged from their liability.

Whereupon, the securities excepted, and now assign the same for error here.

The Court was clearly in error, in our judgment, in refusing to discharge the securities, without payment to the Solicitor General of the fifty dollars, as *commissions*.

First, because the Statute authorizing their discharge on the surrender of their principal, prescribes *no such condition*. And second, because the Solicitor General is not entitled to any such commission as that claimed by him.

By the 1st section of the Act of 1839, the fee of the Solicitor

General in such a case, is *prescribed* and limited to *five dollars*. *Cobb's Dig.* 362. This fee of five dollars, is directed by the Act, to be taxed in the bill of costs; to *that*, the Solicitor General is entitled, and *no more*.

In *Simpson vs. the State*, (9 *Georgia Rep.* 111,) we held that officers charging *costs*, and exacting its payment from the pocket of the citizen, must always shew the *authority of the law* to do so.

The Attorneys and Solicitor General, were included in the fee bill of 1792, (*Prince*, 261.) The 4th and 7th sections of that Act, are very *stringent* against all officers mentioned therein, who shall demand any *greater* or *other fees*, not allowed therein, or such as have since been allowed by subsequent legislation. We intend to say, that all officers are allowed to charge such fees as are allowed by that Act and by subsequent Acts regulating the same, and if they demand more or other fees, *not allowed by law*, then they are amenable to the provisions of that Act. Let the judgment of the Court below be reversed.

No. 75.—EDWARD CAREY, assignee, &c. plaintiff in error, *vs.*
THOMAS HOXEY and others, defendants in error.

- [1.] The general rule in Equity is, that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties, either as plaintiffs or defendants, however numerous they may be.
- [2.] There are, however, exceptions. When the parties are beyond the jurisdiction, or are so numerous that it is impossible to join them all, a Court of Chancery will make such a decree as it can without them.
- [3.] *Numerousness* does not always and necessarily constitute an exception, but if the parties in interest are so very numerous that to join them would be impracticable without almost interminable delays and other inconveniences which would obstruct and probably defeat the purposes of justice, it is an exception to the general rule.
- [4.] The death of a party, when parties are numerous, will not authorize the

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plaintiff to proceed, until his representatives are made parties, unless the numerousness is exceedingly great, and the deaths so frequent that the delays incident to making parties, become almost interminable, and obstruct greatly the purposes of justice.

[5.] In cases where the parties are numerous, and the representation of a deceased party is suspended by litigation, an exception is made, and the Court will proceed to a decree, if it can be done without prejudice.

[6.] To make the pendency of litigation touching the representation of a deceased party an exception to the rule, the Court must be fully advised by allegations in the bill, or by proofs, of the nature and condition of the litigation.

[7.] Whether a case comes within any of the exceptions growing out of numerousness, deaths of parties, and litigation touching the representation, is for the Chancellor to determine, in the exercise of a sound discretion, in view of the circumstances of cases, as they arise.

In Equity, in Muscogee Superior Court. Decision by Judge IVERSON. May Term, 1852.

This bill was filed by Carey, as assignee, against several defendants, stockholders in the Chattahoochee Railroad and Banking Company. At May Term, 1852, counsel for complainant moved the Court for leave to strike out the name of John W. Sutlive, one of the defendants, and to dismiss the bill as to him, upon the following showing:

1st. The affidavit of Wm. B. Stokes, one of complainant's counsel, that he had been informed and believed that Sutlive was dead, and had no legal representative in this State.

2d. The evidence of H. J. Devon, and others, that Sutlive died four or five years ago; left a will, and his wife executrix; who qualified, and shortly thereafter married; that her husband had not taken letters on the estate, nor had they been granted to any one a year ago; that there was now a pending litigation as to the administration on the estate of Sutlive; and that witness had seen a notice published for letters on the estate of Sutlive.

The Court refused to grant the motion, and this decision is assigned as error.

W. DOUGHERTY, for plaintiff in error.

H. HOLT and BENNING, for defendants in error.

By the Court.—NISBET, J. delivering the opinion.

To a correct understanding of the question of Equity practice made in this record, it is necessary to state, that the bill was filed by *Edward Carey*, assignee of the *Bank of Columbus*, against the stockholders of the *Chattahoochee Railroad and Banking Company*, an extinct corporation, for the purpose of enforcing the payment of a large debt alleged to be due to the *Bank of Columbus*, as holder of the bills of the *Chattahoochee R. R. and Banking Company*. It seeks to enforce upon the stockholders a liability for the bills issued by the *C. R. R. and B. Co.* by virtue of a special clause in the charter of that Company, and at the same time to call in and apply to their payment the unpaid stock, according to the number of the shares held by the stockholders respectively. With such objects in view, a large number of persons, charged to be stockholders in the *C. R. R. and Banking Co.* are made parties defendants, and the bill asks that others when ascertained may be made parties. The cause coming on to be heard before the Chancellor below, the counsel for the complainant moved to strike from the bill, the name of John W. Sutlive, one of the defendants, and that the bill be dismissed as to him, upon the exhibition of the following proofs, to wit: "that John W. Sutlive is dead, and that he has no legal representative in this State; that he died some four or five years since, leaving a will in which he appointed his wife executrix, who was qualified some six or eight months after his death; that she had married a man by the name of Munford, who is still living, and who had not taken letters on the estate of Sutlive; that they had not been granted to any one about a year since, and that the administration on his estate was in litigation on the question whether Mrs. Sutlive was, or was not, the representative; that suits were pending against Munford, as *executor de son tort*." One of the witnesses further stated to the Court, that he thought he had recently seen a notice published, that some one had applied for letters of administration on his estate. The presiding

Judge refused the motion, and his decision, in so doing, is assigned for error.

[1.] The question is, whether, under these circumstances, the bill could be dismissed as to Sutlive, and the complainant proceed against the other parties defendants. And this depends upon the question whether the representative of the estate of the deceased Sutlive, is a necessary party. We are thus called upon to consider the general rule as to parties in Equity, and its exceptions, and particularly to inquire whether the facts proven bring this case within any one of such exceptions. The general rule in Equity is, that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or defendants, however numerous they may be. This rule prevents multiplicity of suits, by enabling the Court to decree at once upon the rights of all the parties interested. When all the parties are before the Court, with the privilege of being heard, the Court is enabled to see the whole merits of the case; no one's rights are adjudged behind his back, and comprehensive justice can be administered. *Palk vs. Clinton*, 12 *Vesey*, 53, 54. *Hicock vs. Scribner*, 3 *Johns. Cas.* 311, 315, 317, 319. *Ivy vs. Watts*, 1 *Wash. C. R.* 517. *Caldwell vs. Togart*, 4 *Peters*, 190. *Wendell vs. Van Ransallier*, 1 *Johns. Ch. R.* 349. *Calvert on Parties*, ch. 1, §1, p. 1, 2. 13 *Peters*, 6, 14. 2 *Brock's R.* 20. *Story's Eq. Plead.* §72.

[2.] The exceptions to this rule are founded upon the reasons which sustain it. Without exceptions the rule would defeat its own objects, and prevent the ends for which it exists. There are cases in which, if enforced strictly, it would make impotent the remedial jurisdiction of Chancery. If in any case parties complainants were compelled necessarily to bring before the Court all who are interested, before they could be heard and their rights determined; then it is clear, that cases may occur, must occur, in which they never could be heard and in which their rights never could be adjudicated, because they are cases in which it is impossible to make all who are interested parties. The hands of Chancery are not tied by an impracticable rule. The general rule is established for the convenient administration

of justice. It will not therefore be enforced, when its application being impracticable, it will *prevent* the administration of justice. The exceptions are founded in the necessity, either that the Court must wholly deny to the plaintiff the relief he asks, and to which he is entitled, or grant it without making all who are interested parties and the latter course is adopted, as involving the least evil—taking care always to protect, as far as possible, the rights of the absent. The principle of the general rule, says Lord Eldon, in *Cockburn vs. Thompson*, being founded in concurrence, a departure from it has been said to be justifiable, when necessary. And in all these cases, the Court has not hesitated to depart from it, with the view, by original and subsequent arrangement, to do all that can be done for the purposes of justice, rather than hold that no justice shall subsist among persons who may have entered into these contracts. (16 *Vesey*, 329.) With a clear strong light, Judge Story, in *Wood vs. Dummer*, thus exhibits the rule and its exceptions, and the principle upon which they rest. The general rule is, that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions just as old and as well founded as the rule itself. Where the parties are beyond the jurisdiction, or are so numerous that it is impossible to join them all, a Court of Chancery will make such a decree as it can without them. Its object is to administer justice, and it will not suffer a rule founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to persons before the Court, who are entitled to relief. What is practicable to bring all interests before it, will be done. What is impracticable or impossible, it has not the rashness to attempt; but it contents itself with disposing of the equities before it, leaving as far as it may, the rights of others unprejudiced." (3 *Mason's R.* 317.) The rules of practice are under the control of the Courts. Both right and justice require that the one now being considered, remain steadfast; yet the Courts are at liberty to make exceptions, whenever the varying phases of civilization require them to be made. That this remark may not be set down as demonstrative of a rash spirit of innovation, I refer to Lord Cottenham as authority for a like sug-

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gestion. He says that it is the duty of a Court of Equity to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all new cases, which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights, for which there is no other remedy. *More vs. Malachy*, 1 *Myline & Craig R* 559. *Story's Eq. Plead.* §76.

No case better illustrates both the rule and the exceptions than this case. The stockholders to the *Chattahoochee Railroad and Banking Co.* are very numerous. Some of them may be out of the jurisdiction—others dead, having left insolvent estates, whilst the representation of the estates of others who are dead, may be suspended by litigation at law; and other causes might exist, which would make it impossible or impracticable to bring them all before the Court. To require the plaintiff to stay his suit, to postpone his rights, until all are made parties, would be a virtual denial of them; and yet being all liable to contribute to the payment of his claim, if established, and having rights *inter sese*, which ought to be considered in the decree, there is the most obvious propriety in bringing them all in, if practicable. After all that has been said, it is manifest that any relaxation of the rule must rest within the sound discretion of the Chancellor, under the circumstances of cases, as they arise.

(See *Boisguard et al. vs. Wall*, 1 *Smedes and Marshall's Chancery Reps.* 426, 427.)

Without farther review of this question at large, I proceed to inquire, whether under any one of the exceptions, it was competent to dismiss this bill as to the estate of Sutlive.

[3.] It is argued that the *numerousness* of the parties defendants will authorize the dismissal of this party from the record. *Numerousness* does constitute an exception; but only when the parties in interest are so very numerous, that to join them, would be impracticable, without almost interminable delays and other inconveniences which would obstruct, and probably defeat the purposes of justice. Numbers, therefore are not without more,

sufficient to ground an exception upon. *Numerousness* must exist to that extent which involves the application of the rule in the consequences stated, to wit : almost *interminable* delays, and other inconveniences which would *obstruct, and probably defeat* the purposes of justice. *Milford's Eq. Pl. by Jeremy*, 165, 167. *Story's Eq. Pl.* §94. 2 *Mason's R.* 192. 11 *Vesey*, 429. 16 *Ibid*, 321. 1 *Johns. Ch. R.* 349. 4 *M. and C.* 134. 1 *Ibid*, 559. 3 *Younge and Call*, 224, note.

There is no evidence in this record that such consequences would flow from adherence to the rule in this cause. Indeed from aught that appears, all the parties in interest were made parties to the bill—one having died, the question is whether it is indispensable to make his representative a party.

[4.] Again, it is insisted that the death of a party, where parties are numerous, should of itself make an exception. The contrary has been decided by the *Supreme Court of the United States*, in *Manderville vs. Riggs*, 2 *Peters*, 482. The death of a party ordinarily stays a suit until his representatives are made parties. Numbers cannot, singly considered, take a case out of the rule. Yet I am very clear, that when the numerousness is exceedingly great, and the deaths so frequent that the delays incident to making parties, become almost interminable, and obstruct greatly the purposes of justice, the death of parties alone, might justify a Chancellor in the exercise of a sound discretion, in proceeding with the cause without their representatives being brought upon the record. To lay down a definite rule, under this specific head, would be an unwarrantable attempt. There is not enough, however, of the element of numerousness, or of frequency of deaths apparent in the case now made, to justify us in dispensing with the usual course, simply because a party has died. It does not appear but that this is the first and only death that has occurred among the defendants to this bill. What may occur in the future, and what course may hereafter be proper in this cause, may be well left for futurity to develop.

[5.] With greater confidence and stronger reason the learned counsel holds, that when the representation of the estate of a

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deceased party is suspended by litigation in the Court having jurisdiction of that question, and there are numerous parties in the cause, the complainant ought not to be constrained to await the result of that litigation, but ought to be permitted to dismiss his bill as to such deceased party and proceed. If the representative of a deceased person be a necessary party, and the bill charges that there is no such representative in existence, and that the representation is in litigation, an exception is made, and the Court will retain the bill and proceed to a decree, if it can be done without prejudice. 1 *Mitf. Eq. Pl. by Jeremy*, 180. *Cooper's Eq. Pl.* 35. 2 *Vesey and B.* 85. 3 *Mad. R.* 1. *Story's Eq. Pl.* §91.

[6.] Instead of allegations to the effect stated in this bill, the facts are, upon this motion, brought before the Court by proofs. They are, that Sutlive has been dead four or five years; that he left a will, and appointed his wife executrix; that she qualified and intermarried with one *Munford*, who is still living, and who has not taken out letters on Sutliv's estate, nor had any other person a year ago; the representation on his estate was in litigation, on the question whether Mrs. Sutlive was or was not the representative; that suits are pending against *Munford*, as *executor de son tort*. Mr. Devon, one of the witnesses, stated also that he had recently seen a notice published, that some one had applied for letters on his estate. It must be conceded, that a pretty strong case is made in favor of the motion. *No representation had been taken out a year ago—Sutlive has been dead four or five years, and the administration on his estate in litigation.* I feel that it requires "straining" to enforce the rule here. I should do myself great injustice if I failed to say, that I entertain some doubt. My learned brothers are without doubt. We are however, agreed that the evidence as to the pending litigation is not so full and satisfactory as to permit us, upon the whole, to sustain the complainant's motion. It does not appear that the complainant has made any efforts to procure a representation of this estate. To prevent delays in the settlement of estates, and delays in the prosecution of suits, our Statutes authorize creditors to take out letters; they also authorize the Court of Ordi-

nary, upon thirty days' notice of the death and intestacy of a person, and that no person has applied for letters, to appoint the Clerk administrator. Upon like terms, no doubt, the Clerk may be appointed administrator, with the will annexed, in cases of testacy. *Cobb's N. Dig.* 303, 318, 319, 331.

Ordinarily, therefore, it is competent for a party to force an administration; not of course when the administration is in litigation. It seems but reasonable, notwithstanding the evidence of the pending litigation, that the complainant should have shown some diligence in procuring a representation of Sutlive's estate. As to the litigation itself, we are not informed distinctly as to its character. The witness says that the administration was in litigation, on the question whether Mrs. Sutlive was or was not the representative of the estate. We are not informed how it originated—whether collaterally, in a suit pending against her, as executrix, or directly, upon an application to the Ordinary, for letters by some third person, with the will annexed—how long it had existed, and when it was likely to terminate. As this motion, as before stated, is addressed to the discretion of the Chancellor, his mind and conscience ought to be instructed as to the whole merits of the application, else he cannot exercise that discretion wisely.

[7.] There is some evidence too, that application had been recently made for letters. Mr. Devon states that he had seen a notice of such application. Upon the supposition that this is true, it is a fair inference that ere long the estate will be represented; and in that event the complainant will not be defeated in his justice by *interminable* postponement. Sitting as we do, as an appellate tribunal, we are slow to control a matter within the discretion of the Court below, and affirm the judgement.

No. 76.—F. CARTER and another, administrators, &c. plaintiffs in error, vs. MANSFIELD TORRANCE, administrator, &c. and ANN E. McDUGALD, administratrix, &c.

- [1.] Application to let in a party to defend, after an order has been entered, taking the bill *as confessed*, is to the grace and favor of the Court, and resting in its sound discretion; still it will not be refused, upon a proper excuse being rendered and cost paid, provided the delay has not been extravagantly long; and provided also, its allowance will not work a greater injury to the plaintiff, than its refusal would to the defendant.
- [2.] Ordinarily, in *England*, a party, whether plaintiff or defendant, who had made default at the hearing, and who had thereby suffered his bill to be dismissed, or a decree to be made absolute against him, was relieved, upon the payment of costs.
- [3.] After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order.

In Equity, in Muscogee Superior Court. Tried before Judge IVERSON, May Term, 1852.

At November Term, 1848, of the Superior Court of Muscogee County, the "usual rule" to plead, answer and demur, was granted in this case. At May Term, 1849, Daniel McDougald not having complied with the order, complainant's counsel moved that the bill be taken *pro confesso*, as to him, which motion being refused by the Court, a writ of error was sued out, and at July Term, 1849, of the Supreme Court at Americus, the decision of the Court below was reversed. At November Term, of the Superior Court of Muscogee, the judgment of the Supreme Court was returned and made the judgment of the Court, and the bill taken *pro confesso*.

At the May Term, 1852, of the said Superior Court, Ann E. McDougald, administratrix, &c. of Daniel McDougald, filed her answer, offered to pay the cost, and go to trial at that term, and moved the Court to set aside said order, taking the bill *pro confesso*, which motion the Court granted, and this decision is assigned as error.

In her answer she farther stated that she would submit to any order that the Court might pass in reference to the trial, and would make her answer complete (if incomplete) immediately. She also stated that she believed Daniel McDougald would have answered the bill, had it not been from a misapprehension of the law on the part of himself and his counsel.

W. DOUGHERTY, for plaintiff in error.

BENNING, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

The only question in this case is, was it error in the Court to allow the defendant, Mrs. McDougald, upon the showing made, to open the order taking the bill in this case *as confessed*, and to file her answer.

[1.] There is no general and positive rule upon this subject. Whether the Court will interfere to release a party from the consequences of his default, must depend upon sound discretion, arising out of the circumstances of the case.

In *Williams vs. Thompson*, (2 Bro. Ch. Rep. 279,) Lord *Thurlow* observed, that if a defendant comes in after a bill has been taken *pro confesso*, upon any reasonable ground of indulgence, and pays costs, the Court will attend to his application, if the delay has not been extravagantly long. If the indulgence has been great and frequent, there is danger of abuse of the precedent, for the purposes of delay.

In *Cunningham vs. Cunningham*, (*Ambler*, 89. *Dickens*, 145,) Lord *Hardwicke* said, it was a question on which side the greatest inconvenience would lie. And he finally opened the cause in that case, on payment of cost of the default, and of all subsequent proceedings, notwithstanding two years had elapsed after the decree had been made absolute, on account of the defendant's not appearing at the hearing.

[2.] Ordinarily, in England, a party, whether plaintiff or defendant, who had made default at the hearing, and who had

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thereby suffered his bill to be dismissed, or a decree to be made absolute against him, was relieved upon the usual terms of payment of costs. *Robson vs. Cramell, Dickens*, 61. *Kemp vs. Squire, Dickens*, 131. *Frey vs. Frosser, Dickens*, 298. *Ferran vs. Waite, Dickens*, 782.

Test this case by these authorities, (and we see no objection to the doctrine, as laid down by Lords *Thurlow* and *Hardwicke*,) and we can have no doubt that the Judge was right in setting aside the interlocutory decree of *pro confesso*, and letting in the defendant to answer.

The bill was filed and made returnable, and served to November Term, 1848, at which the complainant obtained the usual rule, requiring the appearance of the defendants; and that they plead, answer, or demur, not demurring alone, at the next term of the Court, to wit, May, 1849. Mansfield Torrance, administrator *de bonis non* of James C. Watson, deceased, answered the bill at that term; and the complainant applied for an order, taking the bill *as confessed*, against Daniel McDougald, the intestate of Ann E. McDougald, there being no appearance as to him; which motion the Court refused to grant, and on the contrary, passed an order rescinding the rule which had been entered for the appearance of the defendants, at the previous term. To this decision, the complainant excepted, and carried the case up to the Supreme Court at Americus, at the July Term, 1851, when the judgment of the Superior Court was reversed, which judgment of the Supreme Court was made the judgment of the Superior Court at the ensuing November Term, 1851; and in conformity thereto, an order *pro confesso* was entered against Daniel McDougald, at the May Term, 1852. Daniel McDougald had died in the meantime, and Ann E. McDougald, his widow, having administered upon his estate, she filed her answer to the complainant's bill, and offered to pay all costs, and go to trial at that time, and moved the Court to set aside the order *pro confesso*, taken against her husband, to allow her to appear.

[3.] Now I admit, that the mere gratuitously putting in an answer, is not sufficient to overrule the order to take the bill

pro confesso. 2 *Smith's Ch. Pr. (Am. ed.)* 23, 25. 2 *Maddock's Ch. Pr. (4th Am. ed.)* 249. But it seems to me that the foregoing history of the case, as disclosed by the complainant himself, in his bill of exceptions, is sufficient to vacate the decree and let in the administratrix to defend.

But she makes this further special showing, in her sworn answer. She says that she has only been a party defendant to this bill, since some time during the last Term of this Court, when she was made a party defendant to the same, by *scire facias*, in the place of Daniel McDougald, deceased. She further says, that she has prepared her answer, and begs leave to file the same, and that said decree may be set aside; that she endeavored to make her answer full, true, direct, and perfect, as she is required to do, and as she is advised by her counsel that it is; but that if it is not, she will, without any delay or costs to the plaintiffs, supply the defect, as soon as it is pointed out to her; and she further says that she is willing to pay the costs already incurred by the plaintiffs in this case, and also, to abide any order, which to the Chancellor may seem reasonable or proper, as to the time when she shall go to trial, if said order is set aside and she permitted to appear and defend the case.

She further says, that she is advised, and believes it to be true, that the failure of the said Daniel McDougald in his lifetime, to answer said bill at the time required by the order in said case, made at the November Term, 1848, commonly called the usual rule, was not owing to any feeling of contempt or disrespect to the Court, but solely to a mistake, as to his rights in Equity; a mistake, which not only his counsel labored under, but the Judge of the Circuit Court presiding who decided that said rule should be set aside, and refused the application for a decree *pro confesso*, made at the same term; and that it was not until these decisions were reversed by the Supreme Court, that the said Daniel and his counsel found out their mistake, and that before said judgment of reversal reached the Superior Court, Daniel McDougald died, and so the case has been in abeyance ever since, until she was made a party; and that

this is the first opportunity which she has had to make the application which she now does.

I am willing to concede, that an application to let in the party to defend, after a decree has been regularly entered against him by default, is to the grace and favor of the Court, if you please. Had this *grace* been denied in the present instance, however, my judgment would have been for a *reversal*.

No. 77.—SOPHIA H. SHORTER and others, plaintiffs in error, vs. GEORGE HARGROVES, Jr., Admr. &c. defendant in error.

- [1.] Where a bill was filed by the distributees of an intestate's estate, against the representative of one of the administrators thereof, who had the sole and exclusive control of the administration, (his co-administrator having done nothing more than qualify as such,) to account for the estate alleged to be in his hands, charging him with having administered and wasted the same: *Held*, that his co-administrator was not a *necessary* party to such suit.
- [2.] When a bill is filed against an administrator, charging him with a breach of trust, in having misapplied and wasted the assets of the estate, the decree may be rendered against him *de bonis propriis*.
- [3.] In this State, an infant who has a guardian appointed and qualified according to the provisions of the Act of 1820, may maintain a suit in Equity by such guardian.
- [4.] Because an administrator *de bonis non* may, under the provisions of the Act of 1845, call the representative of an administrator who died chargeable to the estate for having *wasted* and misapplied the assets thereof, to an account, it does not necessarily follow, that the *distributees* of such estate *may not*.
- [5.] When a complainant seeks to surcharge and falsify a stated account, returned by an administrator to the Court of Ordinary, the burden of proof is upon him; consequently the allegations in his bill should be sufficient to admit the evidence for that purpose, at the trial.
- [6.] When there are only *mistakes* and *omissions* in a stated account, the party shall be allowed no more than to surcharge and falsify; but if it is apparent to the Court, that there has been *fraud* and imposition in the settlement of the account, the whole may be opened.

In Equity, in Muscogee Superior Court. Decision on demurrer, by Judge IVERSON. May Term, 1852.

Sophia H. Shorter, the widow of Eli S. Shorter, and Reuben C. Shorter, John A. Urquhart and wife, and Virginia Shorter, by her guardian, H. S. Smith, filed a bill, as the distributees and heirs at law of Eli S. Shorter, charging that Eli S. Shorter died possessed of a large estate; that Sophia H. Shorter and James H. Shorter, were appointed and qualified as the administrators on his estate; that James H. Shorter was the only acting administrator, and had the sole, exclusive, and entire administration of said estate, to the exclusion of said Sophia H. who did nothing more than qualify as such; possessed himself of the whole estate, and by various fraudulent devices (specially set forth in the bill) converted to his own use the whole of the estate; that by false and fraudulent representations, he procured from the complainants, (who had great confidence in him,) full acquittances and receipts for a mere nominal consideration; that James H. Shorter was dead, and George Hargroves was his regularly appointed administrator. The prayer of the bill was for an account. To this bill an answer was filed, to which was appended an exemplification of the returns and accounts of James H. Shorter, as administrator. Complainants, by leave of the Court, amended their bill, and sought therein to surcharge and falsify many of the credits allowed in the returns.

To the bill, as amended, a demurrer was filed—

1st. Because it appears from the bill, that Sophia H. Shorter, the surviving administrator of Eli S. Shorter, is a necessary party to the bill, and is not made so in her representative capacity.

2d. Because the heirs at law are not the proper parties to ask for an account upon the estate; but the surviving administratrix is the proper party.

3d. Because Virginia Shorter, one of the complainants, being an infant, can sue only by *next* friend, or guardian *ad litem*.

4th. That the following allegations in the bill are not sufficiently certain and definite:

1. "Your orators charge that there were about fifteen thou-

sand acres of land belonging to the said Eli S. Shorter, in the State of Mississippi, of the value of one hundred thousand dollars, or some such large amount, all of which with the title and evidences of the title and interest of said Eli S. went, as before charged, into the hands and possession of said James H.; that he and his administrator since his death, have sold a portion of said lands and received therefor the sum of \$50,000, or some such sum, and complainants here ask that the defendant may discover and distinctly set forth what lands, describing by schedule or otherwise each tract and its value, and what portion has been sold, and at what price, and also the evidence of title to the same in his possession or control; what portion was sold to said Cowles, or taken back in settlement of said claim, and otherwise belonged to Eli S. Shorter.

2. "That the said James H. Shorter had misapplied the funds and effects of said estate of the said Eli S.—in this, that he paid, as shown by voucher No. 7, in the return for the year 1837, five hundred dollars, when there was no debt due from said estate, and no legal evidence of the same furnished by said James H." (The item No. 7, was as follows: "Cash paid Eli Shorter's subscription to open street, by H. S. Smith, \$500 00.)

3. "Also the same in regard to payment, as shown by voucher No. 15, in same return. (No. 15 was as follows: "Cash paid Arthur B. Davis, agent for T. W. Smith & Co. This amount of cash indorsed by them to Eli S. Shorter, \$19,950 00.)

4. "Also the same in relation to payment, as shown by voucher No. 22, in said return." (No. 22 was as follows: "J. H. Falconer's note endorsed by Eli Shorter, payable at the Bank of Pensacola, in Apalachicola, and interest paid J. S. Calhoun, \$3022 25.)

5. "That he paid E. L. DeGraffenreid as shown by voucher No. 46, in same return, when the said DeGraffenreid was indebted to said estate of much larger sum, and which the said James H. has returned as insolvent. (No. 46 was as follows: "Cash advanced E. L. DeGraffenreid on account last sickness, \$98.")

6. "That the payment, as shown by voucher No. 47, in said

returns, was made illegally and improperly, for the reason that there was no debt against said estate, and no sufficient evidence of it to authorize payment by the administrator. (No. 47 was as follows: "Eli S. Shorter, account with Bank of Columbus, for overdraw and interest, \$13,205 33, and stock, \$6,825 06, making \$20,030 20.")

7. "That the payment, as shown by voucher No. 50, in same return, was made to Jerry Cowles, when the estate held against him a note of more than double the amount of said debt, and which was never paid to the estate." (No. 50 was as follows: "Paid Eli S. Shorter's note to Seaton Grantland, due June 29, 1836, and interest, \$13,287 59.")

8. "That he paid, as shown by voucher No. 62, same return, when there was no debt and not sufficient evidence thereof to authorize the same." (No. 62 was as follows: "Cash paid Dan'l Carpenter, in part for money collected for him by Eli S. Shorter, as his attorney, \$1,000.")

9. "That in fact there was no payment made, as per voucher No. 82. (No. 82 was as follows: "Cash sent per mail to Sarah W. Harris, executrix, as per request, \$200.")

10. "That the payment made, as per voucher No. 84, in same return, was unauthorized, as the same was no debt against said estate." (No. 84 was as follows: "Paid Moore & Taver's account on Shorter, Tarver & Co., Eli S. Shorter $\frac{1}{3}$, \$225 83.")

11. "That the said James H. ought not to be allowed credit as claimed in said return, for voucher Nos. 86, 91, 92 and 93, as there is no evidence of such payments, and they were not debts against said estate, if paid." (These were moneys paid and advanced to Mrs. Shorter and Reuben C. Shorter, for tuition, &c.")

12. "That the payment, as shown by voucher No. 107, in return of said administrator, for 1838, was made without sufficient evidence of the debt against said estate, and paid on a note on Pearce N. Lewis, purchased by said James H. with the funds of said estate, at a discount of 25 per cent. or some such large discount." (No. 107 was as follows: "Paid executor and executrix of Dan'l Carpenter, in full of their account of money

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collected by Eli S. Shorter, on the case of St. John & Lewis *vs.* Norton & Mitchell, \$3,652 75.")

13. "That for payment, as shown by voucher No. 147, in said return, there was no evidence the same was ever paid." (No. 147 was as follows: "Cash sent Mrs. Sarah H. Harris per mail, by her request, in part per account, \$200.")

14. "That the payment made, as claimed by voucher No. 170, in said return, is illegal, because Thomas E. Tygart was at the time largely indebted to the estate, and which was never collected." (No. 170 was as follows: "Cash paid Thomas E. Tygart, \$47.")

15. "That the payment, as claimed by voucher No. 178, in said return, is improper, as the claim paid was not a debt against said estate, and because no such payment was in fact paid." (No. 178 was as follows: "Paid amount of Talcomb & Kimbrough's account on Shorter, Tarver & Co. paid \$691 33. Eli S. Shorter, $\frac{1}{2}$ paid \$230 44.")

16. "That the payment, as claimed as per voucher No. 204, in return of 1839, is illegal and improper; because the claim paid was not a debt against said estate, and because no such payment was in fact made." (No. 204 was as follows: "Charles E. Mims' account paid, \$766 35.")

17. "That the same is true in regard to the credit claimed for voucher No. 229; that it was no claim against the estate—was never paid by James H. Shorter, and was improperly allowed by the Court of Ordinary." (No. 229 was as follows: "My account for sundries furnished for the family, \$1949 98.")

18. "That the payments to D. Golightly, Holt & Echols, and Thomas Foster, were extravagant and unnecessary, and improperly paid and allowed." (These items were as follows: "David Golightly, account paid, \$724 92." "Colquitt, Holt and Echols, account paid, \$500." "Cash paid Thomas Foster, Esq. on account for professional services, \$1,300.")

19. "That the payment claimed, as per voucher No. 277, was illegal and improper; because the plaintiffs in said *fa. fa.* and owners of said claims were at the time largely indebted to said estate, and the administrator should have set off the same

against said claim." (No. 277 was as follows: "Cash paid judgment, Jacobi & Hani vs. James H. Shorter, administrator, and Sophia H. Shorter, administratrix, \$443 75.")

20. "That the payment, as claimed by voucher No. 320, return of 1842, was illegal and improperly allowed; because the claim was not a debt against the estate, and no evidence of that fact before the Court of Ordinary, nor that the same had been paid." (No. 320 was as follows: "Cash paid Francis T. Anderson, attorney at law, toward paying cost and expenses of suit in Virginia vs. Preston & Nelms, \$200.")

21. "That the payment, claimed by voucher No. 271, is illegal and improper, in this, that the claim was not a debt against said estate; that the proof before the Court of Ordinary was insufficient to establish that fact; that the administrator presented the drafts to himself and paid the money to himself, if any was paid—but complainants deny that any ought to have been paid, or was in fact paid; and that no credit ought therefore to have been allowed said administrator therefor." (No. 271 was as follows: "Paid Eli S. Shorter's acceptance of John S. Scott's drafts, viz: one for \$1861 12—interest \$75 97; also one originally \$5,713 89, on which are several credits, leaving amount due thereon, \$4,999 96; making together \$7,617 05.")

22. "That the credit claimed and allowed, as per voucher No. 290, in same return, is illegal and improperly allowed, for that there was no mistake in the original return; that the original credit given the estate was correct, and the correction illegal and erroneous." (No. 290 was as follows: "This amount erroneously credited to the estate on the 4th April, and 4th May, 1837, and 1st January, 1838, being John S. Scott's proportionate part of the notes of Alfred Shorter and Obadiah Echols, as appears by intestate's statement in writing, \$5,472 00.")

23. "Your orators charge that in addition to the foregoing specifications, are numerous acts of mismanagement and malfeasance of said administrator, as shown by his said returns, and which they ask in the hearing of this case may be corrected."

24. "That the said administrator show by his returns to have paid claims due others, that were not debts against said estate."

25. "That he has paid accounts and demands bearing no interest against said estate, and has left unpaid notes and other demands on which interest was accruing."

26. "That he sold the effects of said estate at a discount, viz: the claim against Echols & Thornton, which he was not allowed to do by law, and for which there was no necessity."

27. "That the payment claimed by voucher No. 140, in return of 1638, was made, if at all, without authority of law, and improperly allowed by the Court of Ordinary, in this, that the debt (if it existed at all, which complainants deny,) was in the shape of drafts drawn by said Eli S. which was the proper and the only evidence of said debt; that at the time said administrator paid said debt, the same was not proved against said estate; that it was paid, if at all, in the shape and form of an account and large amounts of interest charged and paid; and your orators say that the payment made by said administrator, was made in the notes of Philo D. Woodruff or James N. Bethune, or Woodruff & Bethune, belonging to said estate, and nothing else; that no money was paid nor other notes than those above stated."

28. "That the several credits claimed by said administrator in said returns, for payment to the heirs of Stephen W. Harris, are improper, for that credit has been given twice for the same payment."

29. "That the said administrator rented the store-house and real estate, and hired out the negroes of said estate, to insolvent persons, and required no security, who never paid for the same, to the great loss and injury of said estate."

30. "That he has failed to collect the debts due said estate, when he could have done so."

31. "That he has returned notes and demands as insolvent, which were not so, to wit: the notes of Woodruff & Bethune, and others, as shown by his return, and by his neglect has permitted the Statute of Limitations to bar the right of the heirs

of the said Eli S. to sue for and recover said demands, and taken no steps whatever to present the same."

32. "And your orators further charge, that the said James H. has collected and received from the sale of a house and lot, in the Town of Rome, in said State, belonging to said estate, in the early part of the year 1844, the sum of onethousand dollars, which is not accounted for in said returns."

33. Another ground of demurrer taken, was that the allegation of complainants, that "they did not suspect anything improper, until a short time before the death of said James H. Shorter, and entertained but a suspicion, which accidental circumstances had created, and which induced them to look into his conduct; which examination was commenced, but mainly executed since his death, and the result of which is shown in the charges, in the original and amended bill."

34. "That the said James H. falsely represented to complainants the quantity and value of said Mississippi lands."

35. There is no offer in the bill to do equity.

The Court, upon hearing argument on the demurrer, sustained the same, on each and all of the grounds therein taken, and on this decision error has been assigned.

W. DOUGHERTY, for plaintiff in error.

BENNING, for defendants in error.

By the Court.—WARNER, J. delivering the opinion.

The complainants in this bill, are the heirs at law and legal distributees of the late Eli S. Shorter, deceased, who seek a decree for that portion of the estate of the decedent, which went into the hands of James H. Shorter, one of the administrators thereof; alleging fraud, mismanagement and waste, on the part of such administrator, who is now dead, and George Hargroves, who is his administrator, is made a party defendant.

Sophia H. Shorter, who is one of the distributees of said estate, and James H. Shorter, were the administrators on the estate

of Eli S. Shorter, deceased. It is alleged in the bill, that James H. Shorter had the *sole, exclusive, and entire control of the administration of said estate, to the exclusion of the said Sophia H. who did nothing more than qualify, as such legal representative.*

[1.] The first ground of demurrer which we shall consider, is that which alleges the want of proper parties.

The defendant insisted in the Court below, and contends here, that Sophia H. Shorter, who was one of the administrators of Eli S. Shorter, deceased, is a *necessary* party to this suit.

This bill only seeks a decree for so much of the estate of Eli S. Shorter, as went into the hands of James H. Shorter, as his administrator, which has been administered, improperly managed, and wasted *by him*. The bill does not seek to charge Mrs. Shorter, the other surviving trustee, with anything; but on the contrary, expressly charges, that James H. Shorter had the *sole, exclusive, and entire control of the administration of said estate. A devastavit, by one of two administrators, will not charge his companion, unless he has intentionally, or otherwise, contributed to it. (Williams' Exrs. 1118.)* The rule, as applicable to the case made by this bill, is stated by Mr. Justice Story, in his Commentary on Equity Pleading. "If the bill is so framed, as only to seek an account of so much of the trust fund, as has come to the hands of a particular trustee, *he alone is a necessary party*, at least, unless the bill should charge a breach of trust in *all the trustees.*" *Story's Eq. Pl. 191, §214.*

[2.] Inasmuch as this bill charges James H. Shorter, the administrator, with fraud, maladministration, and waste of the assets which came into his hands, the decree would have been rendered against him, if in life, *de bonis propriis*, as was ruled by this Court, in *Saunders vs. Smith, administrator*, (3 Kelly, 121.) The Court below erred, in our judgment, in deciding that Sophia H. Shorter, administratrix of Eli S. Shorter, deceased, was a *necessary* party to this bill.

[3.] The next objection taken in the demurrer is, that Virginia Shorter, one of the complainants, is an *infant*, who sues by *her guardian*, H. S. Smith, when she should have sued by her *next friend*. In view of the Act of 1820, which was passed for

the protection of the estates of orphans, regulating the appointment of guardians, and requiring them to give bond and security, we are of opinion, that an infant who has a guardian appointed and qualified, according to the provisions of that Act, may maintain a suit in Equity in this State, by such guardian.

[4.] The defendant, by his demurrer, also insists, that the complainants are not the proper parties to call for an account of the administration of the estate of Eli S. Shorter by James H. Shorter, his administrator, inasmuch, as James H. Shorter *died chargeable* to the estate which he represented, and therefore, the surviving administratrix is the proper person to have an account; or according to the provisions of the Act of 1845, an administrator *de bonis non*, on the estate of Eli S. Shorter, would be the proper party to institute the suit. By the Act of 1845, it is declared, that "whenever any executor or administrator, may have been heretofore, or may be hereafter removed, or depart this life, chargeable to the estate which he or she represented, it shall be the duty of such removed executor or administrator, to *account fully* with the administrator *de bonis non*, who may be appointed to finish the administration of such estate." *Cobb's New Dig.* 335. Sophia H. Shorter is not the administrator *de bonis non* of Eli S. Shorter, deceased, nor could she, as the survivor, call the legal representative of her deceased co-administrator, to an account for his *devastavit* of the assets, which he had administered in his lifetime. By the Act of 1836, it is made lawful for any one distributee, or person interested in any estate, to institute his or her bill in Equity, to compel an account or distribution of an estate, without making the other distributees or parties in interest, complainants. (*Prince*, 475.) If it is lawful for one distributee to sue for his or her distributive share of an estate, it would seem to follow as a legitimate consequence, that more than one might sue therefor. It does not appear on the face of this record, that there has ever been any administrator *de bonis non* appointed on the estate of Eli S. Shorter, deceased; but concede there had been, and that he would have been entitled to have called the legal representative of James H. Shorter to

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an account for the estate of Eli S. Shorter, in his hands, according to the provisions of the Act of 1845, would that circumstance necessarily defeat the right of the *distributees*, who are now suing, to call for an account under the provisions of the Act of 1836? Because the administrator *de bonis non* may, under the Act of 1845, call the representative of the deceased administrator to account, does it necessarily follow that the legal distributees of the estate *may not*? We are not yet prepared so to hold, especially on the state of facts disclosed by the record in this case.

[5.] The complainants, by their bill seek to surcharge and falsify the accounts rendered by James H. Shorter, as administrator, to the Court of Ordinary. To that portion of the bill the defendant demurs, because the allegations made therein are not sufficiently definite and distinct for that purpose. When a complainant undertakes to surcharge and falsify a stated account, the burden of proof is upon him. (1 *Story's Eq.* §525.) Consequently, the allegations in his bill should be sufficient to admit the evidence. Taking the allegations in the bill to be true, in relation to the various items in the administrator's account, which the complainants seek, to impeach and set aside, are the same sufficient in law for that purpose?

In regard to voucher number 7, contained in the returns of James H. Shorter, to the Court of Ordinary, which appears in the record to be as follows: "Cash paid Eli S. Shorter's subscription to open street by H. S. Smith, \$500 00:" the allegation in the bill is, "that the said James H. Shorter misapplied the funds and effects of said estate, in this, that he paid, as shewn by voucher No. 7, in the return for the year 1837, five hundred dollars, when there was *no debt due from said estate*, and *no legal evidence of the same furnished by said James H.*" Now if the administrator paid out \$500 00, when there was *no debt due*, for which the same was paid, and no legal evidence of the same furnished by him, then the credit for that amount ought not to be allowed; and the Jury on the trial of the cause, will be authorized so to find, if the complainant shall then prove the allegation, by satisfactory evidence. The existence of non-existence

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of the debt in question, against the estate of Eli S. Shorter, is an *issuable* fact. The allegations in regard to some of the items, are somewhat vague and uncertain; but on demurrer, we are unwilling to say that a *prima facie* case is not made out against them, taking what the complainants allege *to be true*; they will, however, be restricted to their allegations on the trial, in the introduction of their evidence.

[6.] There is another reason why we should be very reluctant to sustain this demurrer. Fraud is directly charged by the complainants, in regard to the settlement of this estate, by the administrator. In *Vernon vs. Vawdry*, (2 *Atkyn's Rep.* 119,) it was held, that if there are only mistakes and omissions, in a *stated account*, the party shall be allowed no more than to *surcharge* and *falsify*; but if it is apparent to the Court, that there has been *fraud* and imposition, the decree must be, that the whole shall be opened, notwithstanding it was a *stated account* of twenty-three years standing, and the party charged with the fraud, was dead. In *Farnham vs. Brooks*, (9 *Pickering's Rep.* 212,) the Court held, that where a bill in Equity to open an account settled, was filed, if it appeared from the facts alleged and proved, that there was *fraud*, actual or constructive, in the settlement, the plaintiff will be entitled to relief, notwithstanding the bill contains no direct averment of fraud. Let the judgment of the Court below, sustaining the demurrer to the complainant's bill be reversed, on all the grounds taken therein.

No. 78.—YOUNG P. OUTLAW and another, plaintiffs in error, vs.
NICHOLAS REDDICK and others.

[1.] When a party is surety on a bond given by a Deputy Sheriff to his principal, and has taken a mortgage on personal property for his indemnity, and the High Sheriff and the Deputy have collected money for which the High Sheriff is sued, and the Deputy has departed the jurisdiction, and

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the mortgage property has come into the possession of a third person upon a pretended claim of right, who is charged with an intention to remove it beyond the jurisdiction of the Courts, a Court of Equity will restrain him by injunction, and require bond and security for its forthcoming, to answer to the claim of the mortgage.

In Equity, in Lee Superior Court. Decision on demurrer, by Judge WARREN. May Term, 1852.

Edward O. Sheffield was elected Sheriff of Dooly County, and appointed Young P. Outlaw, his deputy; requiring of him a bond in the sum of \$2,500 for the faithful discharge of his duty as deputy; on which bond, Nicholas Reddick and Henry Pet-tee, became sureties. To indemnify his sureties from all loss, by reason of their suretyship, Outlaw executed to them a mortgage upon two negroes, and 125 head of cattle.

Subsequently, the Court House of Dooly County was consumed by fire, and in it was destroyed the judgments, executions, &c., and also a large sum of money, as alleged by Sheffield and Outlaw, which had been collected by them, on these executions. Suits were brought by the plaintiffs in *fi. fa.* against Sheffield, many of which are still pending. Judgments have been obtained on others, against Sheffield and his sureties.

The sureties of Outlaw, filed a bill, *quia timet*, alleging the above facts, and farther, that they were ignorant what portion of the said funds were collected by Outlaw, or what would be the extent of their liability as sureties; that Young P. Outlaw, had fled to parts unknown; and that one of the negroes mortgaged had been run off by one Meshac N. B. Outlaw, to Lee County, under some pretended claim of right, and with the intention, as complainants believe, to remove the said negro entirely beyond the reach of complainants. The prayer was to restrain M. N. B. Outlaw from removing the negro specified beyond the reach of the Court, and requiring of him bond for the forthcoming of the property, to answer the complainant's mortgage.

To this bill a demurrer was filed—

1st. Because there is no equity in the bill.

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2d. Because the bond executed by the Deputy, on which complainants are sureties, is absolutely void.

3d. Because the liability of complainants is not such as will be protected by "*quia timet*," in a Court of Chancery.

The Court overruled the demurrer, and this decision is assigned as error.

W. H. HAWKINS, for plaintiffs in error.

SULLIVAN & BROWN, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The demurrer verifies the facts stated in the bill. The complainants charge, that they are sureties for Y. P. Outlaw, as Deputy Sheriff of Dooly County, on a bond given to his principal, to secure the faithful execution of his duties; that for their indemnity, he executed to them a mortgage on two slaves and other property; that large sums of money were collected by the Sheriff of Dooly County, and his deputy, which they (the Sheriffs) allege were destroyed by fire when the Court House of that County was burned; that as much as \$2,500, was collected by their principal—but the precise sum, they do not know; that suits have been instituted for this money against the Sheriff—some of which are now pending, and others have been reduced to judgment; that their principal, the Deputy Sheriff, has fled to parts unknown; that one of the negroes mortgaged to the complainants, has been run off under some pretended claim of right, into Lee County, with the intention, as they believe, of removing him entirely beyond their reach, by the defendant, one Meshac N. B. Outlaw, and they pray that he may be enjoined from removing this negro beyond the jurisdiction of the Court, and that he be decreed to give bond and security for the forthcoming of the slave, to respond to their mortgage.

We think the case made authorizes the relief asked until an answer and a hearing on the merits. Upon the hearing, the whole matter will be within the control of the Court. The com-

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plainants show facts sufficient to satisfy a Chancellor that their principal will be in default, and that they may become chargeable on his bond. They show a lien by mortgage on the negro, in the hands of the defendant. This lien is the right upon which they plant themselves, and by virtue of which they have a standing in Equity. They also aver the departure of their principal from the jurisdiction, and an intention on the part of the defendant to eloin the property. Under such circumstances, it is within the province of Chancery to lay its hand upon the property, and provide for its appearance to respond to their mortgage. The relief sought, does not determine the title to the slave, nor does it divest the possession; upon the hearing, the defendant will stand upon all his rights. If the facts charged, are proven on the trial, the relief ought to be permanent. When a debtor assigns a future interest in personal property to his creditors, the latter may come into a Court of Chancery to have the property secured to their future use. *Story's Eq. Jurisp.* §§846, 603, note. *Johnson vs. Mills*, 1 Vesey, 282, 283. This principle is applicable to this case. That an injunction will be granted to protect mortgaged property, before the mortgaged debt is due. (See *Salmon vs. Clagett*, 3 Bland's Ch. R. 180.)

Let the judgment be affirmed.

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ABATEMENT OF ACTION.

1. Where an action of trespass was brought for a *direct* and *forcible injury* to the property of the plaintiff, and the defendant died pending the suit: *Held*, that the action *abated* by his death, and could not be revived against his personal representative. *Pitts vs. Ison*..... 151

ACT OF LEGISLATURE.

See *Estoppel*, 3.

ACTION.

1. A delivered to B, the following paper, signed by himself: "Received of B, ninety dollars in cash, and one note on E. D. of \$116, which I agree to settle when we have a final settlement this, 8 April, 1843, with interest from date:" *Held*, that after the lapse of a reasonable time, and demand of a settlement, and refusal, an action lay in favor of B against A, upon this agreement, for damages. *Garrison vs. Wilcoxson*..... 154

ADMINISTRATORS, EXECUTORS AND GUARDIANS.

1. An administrator having sold a slave as the property of the estate which he represents, under an order of the Court of Ordinary, warranted the property to be sound, *so far as the office of administrator authorized him*: *Held*, that he is personally liable upon this warranty. *Aven vs. Beckom*..... 1

2. A debt due to the Central Bank of Georgia, is not, in legal contemplation, a debt due to the public, as contemplated by the Act of 1792, which will entitle it to *priority* of payment out of a decedent's estate, on general principles; but it is competent for the General Assembly to declare that debts due to the Central Bank shall have priority of payment in the same manner as debts due to the public; and the General Assembly have so declared by the 12th section of the amended charter of the Central Bank. *The Central Bank vs. Little, administrator, &c.*..... 346
3. Where an executor or administrator, *collusively* sells the goods of his testator or intestate at an *undervalue*, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer for the real value; notwithstanding the object was accomplished under the *form* of a judicial sale by the Sheriff, under an execution obtained against the administrator, in his representative capacity. *Skrine vs. Simmons and wife*..... 401
4. A Court of Equity will look into the whole transaction; consider the relative position and duties of the parties, and if it shall satisfactorily appear that the property of the defendant's intestate has been sold at an *undervalue* by his *collusion* with the plaintiff in *fi. fa.* and his *active* interference on the day of sale, to produce that result, he will not be permitted to shelter himself from a full discovery, under the mere *form of a judicial sale*. *Ibid.*
5. Where a judgment has been obtained, and an execution has issued in the lifetime of the defendant, his subsequent death will not arrest the collection of the debt by levy and sale of the intestate's property, notwithstanding his heirs at law are *minors*, and no administration has been granted upon his estate. *Brooks et al. vs. Rooney and another*..... 423

6. At Common Law, the powers of an *administrator de bonis non*, extend only to the administration of the estate so far as it was unadministered when he came into the trust. He cannot call the removed executor to an account, nor can he collect the purchase money for property sold by his predecessor. *Gilbert vs. Hardwick*..... 599
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8. Where the bill charges the administrator with a breach of trust, in having misapplied and wasted the assets of the estate, the decree may be rendered against him, *de bonis propriis*. *Ibid*.
9. Because an administrator *de bonis non*, under the provisions of the Act of 1845, *may* call the representative of a deceased administrator to account, for having wasted and misapplied the assets, it does not necessarily follow that the distributees of such estate *may not*. *Ibid*.

See *Abatement*, 1. *Equity*, 44, 45. *Pleading*, 7.

ADMISSIONS.

See *Criminal Law*, 6.

ADULTERY.

See *Criminal Law*, 6.

AGREEMENT.

See *Action*, 1. *Equity*, 4.

ALIAS FI. FA.

See *Execution*, 8, 9.

AMENDMENT.

See *Equity*, 21, 22, 23, 24, 30 to 34. *Pleading*, 2, 7.

APPEAL.

1. A party within the time applies to the Clerk to enter an appeal, and gives bond and security, which is entered on the minutes, in which it is recited that the costs are paid; and which minutes are approved and signed by the presiding Judge. The costs are not actually paid, not from the unwillingness of the party, but from the inability of the Clerk to specify the amount. No demand for the costs was ever made by the Clerk: *Held*, that the Statute requiring the cost to be paid before entering the appeal, was substantially complied with, and that the appeal was regularly entered. *Short et al. vs. Cohen*..... 39
2. In determining whether an appeal is frivolous, it is the duty of the Jury to consider all the evidence in the cause. *Garrison vs. Wilcoxson*..... 154

ATTORNEY.

See *Practice Supr. Court*, 2.

BAIL.

See *Costs*, 4.

BAILMENT.

See *Slaves*, 1.

BANKS AND BANKING.

See *Corporations*, 5 to 11. *Equity*, 25.

BANKRUPT LAW.

1. A certified copy of the order of discharge, reciting all the previous proceedings which had been had in the case, and that the applicant had fully complied with every requisition which had been made upon him by the Court, and obeyed every provision of the law, is a proper certificate of discharge, as required by the Act. *McNeil vs. Knott*..... 142
2. Under the Act of 1841, contingent demands arising out of indorsements, bail and other uncertain undertakings, may be proven against the bankrupt; and when these claims become absolute, they will be allowed to participate in the bankrupt's effects. *Ibid.*

See *Pleading*, 1.

BEQUEST.

See *Legacy*.

BILL OF EXCEPTIONS.

1. A Court of Equity will not entertain a bill for the purpose of correcting an alleged *mistake* in regard to the *facts* stated in a bill of exceptions, and certified by a Judge of the Superior Court, according to the provisions of the Act of 1845, organizing the Supreme Court of Georgia;

especially, when the party tendering such bill of exceptions, made no complaint of any mistake therein, until after the argument of the cause in the Supreme Court, and the judgment of the Court therein. The Act of 1845, points out a different remedy, when the presiding Judge shall refuse to certify a bill of exceptions, *properly* tendered—that is to say, if such bill of exceptions be *true and consistent* with what transpired in the cause before him. *Logan vs. Gigley*..... 243

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BOND.

1. The bare circumstance that the name of a person who did not execute the bond is inserted in the body of it as one of the obligors, and a seal is left for his name, is not, *of itself*, evidence to show that those who did sign and deliver it, delivered it only as an *escrow*, upon condition that that person also should execute it. *Towns, Gov. &c. vs. Killet et al.*..... 286
2. Will a Justice of the Inferior Court, who has certified by his official attestation, that a Sheriff's bond has been sealed and *delivered*, be allowed to deny that the bond was in fact delivered? *Query. Ibid*
3. Although a Sheriff's bond be originally delivered as an *escrow*, yet subsequently the sureties suffer him to act under this bond, will it not authorize the inference that they had waived their demand of additional sureties, and had consented to be bound by it as it stood? And would not a contrary doctrine be to sanction a fraud upon the public? *Query. Ibid.*

CENTRAL BANK.

See *Administrators, &c.* 2. *Constitutional Law*, 1. *Jurisdiction*, 4.

CHARGE OF THE COURT.

1. In an action of trover for the recovery of a slave alleged to have been *loaned* by a father to his daughter, where the evidence was conflicting as to whether it was *a gift* or *a loan*: *Held*, that on the trial it was the duty of the Court to have instructed the Jury what the law required to constitute a valid parol gift, and also what the law denominates a loan, and then left the Jury to decide whether it was a gift or a loan; and that it is error for the Court to express any opinion whether the testimony proved a loan or a gift. *Respass vs. Young*... 114
2. A reversal upon writ of error, cannot be claimed because the Court in its charge referred, by way of illustration, to evidence which was not in the record, provided the Jury were referred to the testimony, and directed to examine it for themselves, and were reminded that they were the exclusive judges of the facts, irrespective of any opinion which the Court might entertain or express respecting them. *Stephen (a slave) vs. The State*..... 225
3. It is not only the privilege but the duty of the Court to state the legal effect of testimony, when called on to do so by the Jury. The construction of the law arising from undisputed facts, is undoubtedly within the jurisdiction of the Court. *Thornton vs. Lane*..... 459
4. It is not error in the presiding Judge to say to the Jury, that the privilege and responsibility of rectifying errors of law which may be committed by the Court did not

rest with them, but that the Constitution of the State had conferred this power elsewhere. *Ibid.*

5. It is no error in the Judge to instruct the Jury, that they were bound to regard the law as stated by him to be the law of the case. The Supreme Court has been vigilant to protect the just rights and privileges of the Jury, from the encroachment of the Bench. It will be equally vigilant in upholding the powers of the Court. *Ibid.*
6. It is error in the presiding Judge to state to the Jury what has or has not been proved. *Rushin vs. Shields & Ball* 636
7. It is error in the Court, to charge the law upon an assumed state of facts which have not been proven. *Towns, Gov. &c. vs. Killet et al.* 286
8. It is error in the Court to restrict the consideration of the Jury in its charge, to a portion of the testimony only ; and to instruct them that they must find for the plaintiff or defendant, according as they may find that to be. *Ibid.*
9. When it is apparent that justice *may* have been defeated by the misapprehension of the facts or the law by the Court, in its charge to the Jury, the error calls for correction, as a matter of right. *Terry et al. vs. Buffington et al.* 337
10. If, taking all the instructions collectively, the law seems to have been properly expounded to the Jury, the judgment will not be reversed, though some one opinion may be erroneous. The correctness of a charge must be determined by the whole, taken together. *Ibid.*

CLERK.

See *Process*, 1.

CONSTABLE.

1. A return made by a Constable of "no personal property to be found," is admissible to prove that fact, when made by him on a Tax Collector's execution. Proof of that fact cannot be made by parol. There must be an official return of it. *Lessee of Gledney vs. Deavors*..... 79

See *Tax, &c.* 1.

CONSTITUTIONAL LAW.

1. *Bills of credit*, as contemplated by the 10th section of the 1st article of the Constitution of the United States, are such as are drawn or issued by the State, upon the *general credit thereof*, without the appropriation of any specific fund for the payment or ultimate redemption of such bills. *The Central Bank vs. Little, admr. &c.*..... 346
2. While the amendments to the Constitution of the United States were *primarily* intended to be restrictive upon the powers of the General Government, and not the Legislatures of the several States, yet they are "declaratory" of great principles of civil liberty, which neither the National nor the State Governments can infringe. *Campbell vs. The State*..... 353
3. The 6th article of the Amendments to the Constitution of the United States, providing that "in all criminal prosecutions, the accused shall be confronted with the witnesses against him," is not contravened by the admission in evidence of the *dying declarations* of the deceased, on the trial of the prisoner charged with the homicide. *Ibid.*

See *Jurisdiction*, 1. *Railroads*, 1. *Tax, &c.* 2, 3.

CONVERSION.

See *Trover*, 1.

CORPORATIONS.

1. When, by the by-law of a Railroad Company, it was required that all the stockholders of the Company, who should fail or refuse to pay up the instalments then called in, or which should be called in, should be sued for the full amount of their subscription to the Company : *Held*, in a suit against the President of the Company, who was *present* at the adoption of the by-law, that a demand of payment from him prior to suit, was not necessary. *Winter vs. The Muscogee Railroad Co.*..... 438
2. Corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement and consent. *Ibid.*
3. Although alterations may be made in the charter of an incorporated Company, by the procurement of the Company, in furtherance of the designs and objects of the Company; yet in all such cases, due regard must always be had to the *inviolability* of private contracts. The *original* contract of the parties cannot be *materially* or *essentially* altered by an *amended* charter, so as to bind the subscribers thereto, *without their assent*. *Ibid.*
4. At Common Law, upon the dissolution of a corporation, the debts due to and from it, are extinguished. *Thorn-ton vs. Lane.*..... 459
5. The 11th section of the charter of the Planters' & Mechanics' Bank of Columbus provides, that "the persons and property of the stockholders, shall be pledged and held bound in proportion to the amount of shares and value thereof, that each individual or company may hold in said Bank, for the *ultimate redemption* of the bills

or notes issued by said Bank, in the same manner as in common actions of debt; and no stockholder shall be relieved from such liability by sale of his stock, until he shall have caused to be given sixty days notice of said sale, in some public gazette of this State. *Held*, 1st. That the liability of the stockholder to the billholder for the ultimate redemption of the notes of the corporation survives the dissolution of the charter, and is not extinguished by the judicial forfeiture of the same. *Ibid*.

6. 2d. That this is a statutory liability, *in the nature of a specialty*, and is not barred until twenty years. *Ibid*.
7. 3d. That the value of the stock is to be estimated according to the valuation put upon it by the second section of the charter, to wit: \$100 per share. *Ibid*.
8. 4th. That all the stockholders who have given notice in terms of the Act are exempt, unless the failure occurs within *six months* thereafter. All other stockholders are liable for the redemption of the bills, whether they have transferred or not. *Ibid*.
9. 5th. That a judgment, *fi. fa.* and return of "*nulla bona*," in a suit against the corporation or its assignee, is sufficient to authorize the bill-holder to proceed against the stockholder personally. *Ibid*.
10. In a suit by the billholder against the stockholder, a transfer of stock made on the books of the Bank by the Cashier of the corporation, of which the defendant was a member at the time, and free access being secured to him by law for the purpose of inspecting said books, is *prima facie* evidence of his ownership of the shares. *Ibid*.
11. Will he be permitted to repudiate the transfer without verifying his plea? *Query. Ibid*.

12. Persons owning land as tenants in common, are incorporated for the purpose of selling the lands, and making improvements thereon, and the charter is accepted: *Held*, that the title to the property vests in the corporation, and that one of the tenants cannot maintain suit, to enjoin a trespass on the same. The Corporation only can sue. *Colquitt et al. vs. Howard*..... 556
13. One of the original tenants cannot maintain a suit to enjoin a breach of a covenant entered into by a purchaser from the corporation, of portions of such land, with the corporation. *Ibid.*
14. Persons exercising the corporate powers of a corporation, may, in their character as trustees, be held liable in a Court of Chancery, for a fraudulent breach of trust; and a stockholder, in a case where the Directors colluded with others, who have made themselves liable by neglect or fraud, and refuse to prosecute, or where they are necessarily parties defendant, may file a bill on his own account, and in behalf of the other stockholders. In such a case, the corporation must be made a party defendant. *Ibid.*

See *Jurisdiction*, 3. *Railroads*, 1.

COSTS.

1. A Sheriff or other arresting officer in a criminal prosecution, has no authority to seize the defendant's property, and hold the same for the payment of costs, unless directed so to do by the Magistrate issuing the warrant, as provided by the Act of 1816. *Whaley vs. The State*... 128
2. *Query*, whether actions for injuries to personal property are within the provisions of 22d and 23d *Charles II.* which declares that in personal actions, when damages

are below 40 shillings, the plaintiff shall recover no more costs than damages. *Mangham vs. Reed*..... 137

3. In an action of trespass, for an injury done to the plaintiff's slave, the Jury rendered a verdict in favor of the plaintiff for costs: *Held*, that such a verdict and the judgment thereon, are nullities; that in legal effect, this was a finding in favor of defendant, and the law carried the costs in his favor against the plaintiff. *Ibid*.
4. Where the bail in a criminal case, surrender their principal in open Court, in discharge of their liability, as provided by the Act of 1831, the Solicitor General is not entitled to charge commissions on the amount of the bond or forfeited recognizance, but is only entitled to charge the fee of five dollars, prescribed by the Act of 1839, and no more. *Stamper et al. vs. The State*..... 643
5. All officers charging costs, and exacting its payment from the pocket of the citizen, must always show the authority of the law to do so. *Ibid*.

COUNTY OFFICERS.

See *Tax and Tax Collectors*.

CRIMINAL LAW.

1. If the indictment sets out the offence in the language of the Penal Code creating it, or so plainly and distinctly that the Jury can clearly understand the nature of the offence, it is sufficient. *Cook vs. The State*..... 49
2. If a married man have criminal intercourse with his own daughter, she being a single woman, he is guilty of incestuous adultery, and she of incestuous fornication. *Ibid*.

3. An indictment charges the offence to have been committed on a day certain, *and on divers days before and after that time*: *Held*, that the words *italicized*, may be rejected as surplusage. *Ibid.*
4. The offence may be charged to have been committed on any day previous to the finding of the bill, and may be proven at any time within the term of limitation. *Ibid.*
5. The presiding Judge, upon determining certain motions to quash an indictment, said that he had doubts about the law, and having such doubts, he would give the State the benefit of them, because the State was not allowed to carry the case to the Supreme Court: *Held*, that this remark was neither an error nor an irregularity. *Ibid.*
6. In prosecutions for bigamy, adultery, or incestuous adultery, the admissions of the defendant, as to the fact of his marriage, are admissible in evidence, and it is not necessary to prove a marriage in fact. *Ibid.*
7. Offences differing from each other and varying in their punishment, may be included in the same indictment and tried at the same time; provided they be of the same nature, and differ only in degree; *e.g.* the *forgery* of an instrument, and the *uttering* and *publishing* it as *true*, knowing it to be *false*. *Hoskins vs. The State*..... 92
8. Upon an indictment for *forgery*, it is competent to prove that the writing was actually passed, for the purpose of establishing the fraudulent intent with which it was made. *Ibid.*
9. To constitute a *forgery* of an *order*, for the delivery of goods, within the *first* section of the *seventh* division of the Penal Code, it is not necessary that the person

whose name is forged, have goods in the hands of the drawee. *Ibid.*

10. As a general rule, in a criminal case, the State will not be allowed to re-open the testimony, after the Solicitor General has announced to the Court that the evidence is closed. If, however, this is inadvertently done, and application is immediately made to tender farther proof, it may be received ; provided no motion has been made in behalf of defendant, and no evidence introduced, and his witnesses have not been discharged in consequence of the declaration. *Ibid.*
11. While it is not right to encourage one citizen to tempt another to the commission of a crime, yet when the initiatory steps have been taken, it is excusable to connive at conduct which will lead to the detection of the offender. *Whaley vs. The State*..... 123
12. Under the Act of 1850, transferring the trial of capital offences committed by slaves to the Superior Court, Juries are to be impannelled and sworn in the same manner as for the trial of crimes committed by free white persons. *Stephen, (a slave) vs. The State*..... 225
13. A count of rape and an attempt to commit a rape on a free white female, by a slave, may be united in the same indictment. The two counts are of the same nature. They require the same plea, the same judgment, and the same quantum of punishment. *Ibid.*
14. The proper time for the prisoner to avail himself of a misjoinder of counts, and to compel an election, is when the indictment is read to the Jury. He may avail himself of the objection by demurrer, or on motion to arrest the judgment. *Ibid.*
15. On an indictment for a rape, the Jury may find the ac-

cused not guilty of the offence charged, but of the attempt only; provided the evidence will warrant such finding. It will not vitiate the verdict to swear the Jury to try the prisoner for the attempt as well as the rape. *Ibid.*

16. A person who has committed an offence, may be convicted upon his own voluntary confession, although it is totally uncorroborated by other proof. *Ibid.*

17. In England, the doctrine may be considered as well established, whatever doubts may have been expressed in this country to the contrary, that *extra-judicial confessions*, uncorroborated by any other proof, as to the *corpus delicti*, are of themselves, sufficient to convict the prisoner. *Ibid.*

18. Every indictment is sufficiently technical in this State, which states the offence so plainly, that a man of ordinary capacity would readily understand the nature of the offence charged. *Ibid.*

19. The Courts will take judicial notice of the usual abbreviations of christian names. *Ibid.*

20. The XLVth section of the XIVth division of the Penal Code enacts, that upon the trial of the indictment for any offence, the Jury may find the accused not guilty of the offence, but guilty of an attempt to commit such an offence, without any special count in the indictment for such attempt; provided the evidence before them will warrant such finding. By the Act of 1850, indictments against slaves and free persons of color, charged with capital offences, are to be framed in the same manner as indictments against free white persons: *Held*, that the same incidents follow as to the power of the Jury in finding the accused guilty of the attempt. *Ibid.*

21. The *attempt* to procure a slave to commit a crime or misdemeanor, under the amendatory Act of 1850, means an offence, which if committed, would constitute a crime or misdemeanor in a free white person. *Grady vs. The State* 253

22. Whether or not the *venue* be properly laid in a bill of indictment, when the facts are not disputed, is a question of law for the Court. *Ibid.*

23. When a party is convicted upon a capital charge, it is proper to ask if he has anything to say why judgment of death should not be pronounced on him ; but in minor felonies, the omission of this ceremony will not be a sufficient ground for reversing the judgment—provided it appears that the prisoner and his counsel were both in Court when sentence was pronounced, and urged nothing in arrest of judgment or in mitigation of defendant's guilt. *Ibid.*

24. Upon an indictment for murder, before the Superior Court for the County of Stewart, the proof was that the crime was committed "in the house of the witness, at Florence, Stewart County :?" *Held*, sufficient proof that the crime was committed within the jurisdiction of the Court. *Milchum vs. The State*..... 615

25. The indictment charged that *William B. M.* was murdered by the prisoner. The proof was the homicide of *W. B. M.* : *Held*, that the proof of identity was well left to the Jury, and they having found a verdict of guilty, it ought not to be disturbed. *Ibid.*

26. The proof was, "that prisoner stooped down ; he rose with a six-barrelled pistol in his hand ; presented it at the breast of the deceased, not more than six inches distant ; took deliberate aim, long enough to count 10 or

15, before he fired; he fired the pistol about the right nipple; deceased brought a groan—his face contracted—fell upon the floor, and in about five minutes expired:” *Held*, that the killing was sufficiently proven. *Ibid.*

27. A witness testified that he was some 30 or 40 yards from the house when deceased was killed. Upon hearing the report of the pistol, he looked towards the house and saw a person that he took to be the prisoner run out; who ran a few paces, and turned and ran again into the house, and immediately came out again and ran to where witness stood; he ran slow and awkward, which induced witness to think he was very drunk; when he came to witness he seemed greatly agitated and troubled, and at the moment of coming up to him, exclaimed, “that he would not have done it for the world.” One minute would probably cover the time from the firing until the prisoner uttered the exclamation, two certainly would: *Held*, that under the circumstances, the exclamation was admissible as a part of the *res gestæ*. *Ibid.*

28. If one is killed by another by a pistol shot, and the intention to shoot entered the mind of the slayer but one moment before the firing, this is evidence of express malice, *provided* there was no assault upon the person killing, or attempt otherwise to do him a violent personal injury by the deceased. *Ibid.*

See *Costs*, 1, 4, 5. *Evidence*, 2 to 6. *Jury*, 1. *Rape*, 1, 2, 3. *Practice Superior Court*, 3. *Verdict*, 1.

DAMAGES.

See *Seduction*, 2.

DEBTOR AND CREDITOR.

1. Where a *trust* has been created for the benefit of creditors, it is the right of any one of the creditors to sue in behalf of himself and the rest, to enforce the execution of the trust for the benefit of all who are interested. *McDougald et al. vs. Dougherty et al.*..... 520

See *Equity*, 2, 20.

DEED.

1. If a deed be signed and sealed, and declared by the grantor in the presence of the attesting witnesses, to be delivered as his deed, it is an effectual delivery, notwithstanding the grantee was not present, nor any person in his behalf, and the deed remaining under the control of the grantor. *Rushin vs. Shields & Ball*..... 636
2. The delivery of a deed may be inferred from its possession by the grantee, or from his possession of the land under the deed. *Ibid.*

See *Registry*.

DISCONTINUANCE.

1. A case is not discontinued when permitted to lie over without any action thereon for a number of terms by the Court. *Gilbert vs. Hardwick*..... 599

DISTRIBUTION.

See *Administrators, &c.*

DYING DECLARATIONS.

See *Constitutional Law*, 3. *Evidence*, 13, 14. *New Trial*, 5.

EJECTMENT.

1. When a plaintiff in ejectment relies upon possession alone for a recovery, and the defendant shows possession in himself, *bona fide* acquired, he can defeat the plaintiff's recovery, by showing title in a third person, or by showing that plaintiff has parted with his interest in the land by transferring a bond which he holds for titles to a third person: *Aliter*, if the defendant came into possession as a trespasser. *Jones vs. Scoggins*..... 119

EQUITY.

1. Where a decree in Equity was obtained and is sought to be enforced by the complainants, and the defendants file a bill to review and reverse it, upon the ground that the bill was never served, and that the entry and return of service by the Sheriff was fraudulently directed and procured to be made by the party or their attorney: *Held*, that Chancery will entertain such a bill and grant relief thereon, provided it be brought within twenty years from the time of the first judgment. *Guerry and wife vs. Durham et al*..... 9
2. A Court of Equity will not entertain jurisdiction for the purpose of enabling the creditors of an intestate to collect their demands from the administrators of such intestate, when the remedy at Law is ample and adequate. *Pease et al. vs. Scranton et al*..... 33
3. Where two or more persons claim the same thing by different or separate interests, and another person (not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody,) fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. *Strange vs. Bell* 103

4. At Law, an agreement must be strictly performed ; but Courts of Equity will in cases of accident, surprise, fraud or ignorance, under certain circumstances, grant relief. *Wyche and wife vs. Green*..... 159
5. If a writing has been executed with a view of obtaining a particular object, and by mistake it has been so drawn as not to have the contemplated operation at Law, Chancery will reform the instrument, so that it will fulfil the intention of the parties. Agreements, whether executed or executory, within or without the Statute of Frauds, whether for the conveyance of real or personal property, will be reformed by Courts of Equity, on the ground of mistake. *Ibid.*
6. The proper inquiry in all applications for relief against mistakes is, does the instrument contain the true agreement between the parties? Is it what they intended it should be? *Ibid.*
7. As to the degree of proof that will be required before relief will be granted, no uniformly inflexible rule has been prescribed. The mistake itself should be *plain*, and made out by evidence clear of all reasonable doubt. *Ibid.*
8. Relief will be granted in certain cases, not only where the fact of the mistake is expressly established, but where it may be fairly inferred from the nature of the transaction. *Ibid.*
9. Courts of Equity will grant relief more readily when the mistake is made to appear by reference to another writing. *Ibid.*
10. The instrument reformed, takes effect from the time when it was originally executed. *Ibid.*

11. It is not necessary that the *donee* should be cognizant of the instructions given to the scrivener by the *donor*. It is sufficient for those claiming under the deed, to have it reformed, if he accepted it as it was understood and intended to be drawn at the time it was executed. *Ibid.*

12. Equity will interfere to correct mistakes and reform written contracts between the original parties and those claiming under them, in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees and judgment creditors or purchasers from them with notice of all the facts. *Ibid.*

13. Title to relief against mistakes may be forfeited by acquiescence or unreasonable delay ; but lapse of time can never be set up as a defence, when it would not constitute a good statutory bar at Law. *Ibid.*

14. The Courts, slow at all times to exert their authority to reform written instruments, will be much more reluctant to interfere, where upwards of thirty years have elapsed since the execution of the instrument. In such a case the mistake should be made out by the most explicit and unequivocal proof. *Ibid.*

15. If there is equity in a bill, the want of all the necessary parties is not a sufficient ground for refusing to sanction it. *Ibid.*

16. According to the laws of Georgia, in Equity causes the facts are to be submitted to a Special Jury, who have the exclusive right to pass upon them ; and all questions of law are for the determination of the Court alone. *Mounce vs. Byars et al.*..... 180

17. In Equity, a re-hearing will sometimes be ordered *upon*

- *terms*, although in strictness no rule of law has been violated on the trial, provided it manifestly appear from the record that on account of the rejection of testimony the party prevailing has obtained an unconscientious advantage. *Simms, administrator, vs. Smith*..... 195

- 18. In a bill for specific performance and also to enjoin a trespass, the answer admits the trespass and in words denies the agreement set out in the bill, admitting however the facts in part, which make up the agreement, and the facts in part which show that it was entered into. Upon a motion to dissolve upon the coming in of the answer: *Held*, that there was enough admitted to retain the injunction. *The Justices, &c. vs. The Griffin and W. P. P. R. Co*..... 246

- 19. It is not necessary to allege the commission of a fraud *in totidem verbis*. If the bill states with distinctness and precision facts and circumstances which in themselves amount to a fraud, it is quite as unobjectionable as if the very term itself was employed. *Skrine vs. Simmons and wife*..... 401

- 20. A fund is in the hands of a receiver, appointed on a bill which has been dismissed on demurrer. A judgment creditor files a bill, alleging that he has levied on the property, the rent of which constitutes the fund in the receiver's hand, to which property a claim is interposed at Law, and still pending; that there is no other property of defendant *in fi. fa.* to levy on, and that there are older judgments sufficient to absorb the proceeds of the property, if found subject: *Held*, that a Court of Chancery will order the fund held up against the claim of assignees (purchasing subsequent to the date of the judgment) to await the farther order of the Court upon the result of the trial at Law. *Fields vs. Jones et al*..... 418

21. An injunction or other sworn bill, cannot be amended by *striking out* material and substantial allegations and charges. They are to be corrected by the addition of explanatory or supplemental statements. *Carey, assignee, vs. Smith*..... 539

22. Amendments to a bill, can only be granted when the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor *repugnant* thereto; and a party under the privilege of *amending*, is not to introduce matter which will constitute a *new bill*. *Ibid.*

23. An injunction bill will not be amended unless the proposed amendments are distinctly stated to the Court, and verified by the oath of the complainant, nor unless a sufficient excuse is rendered for not incorporating them in the original bill, and the application to amend must be made as soon as the necessity of the amendments is discovered. *Ibid.*

24. An *amended* bill is considered as an original bill. *Ibid.*

25. The general rule is, that where parties are concerned in *illegal* agreements or other illegal transactions, whether they are *mala prohibita* or *mala in se*, the Court, following the rule of law as to participators in a common crime, will not interpose to grant any relief, acting upon the well known maxim, "*In pari delicto, potior est conditio defendentis et possidentis.*" In all such cases, the rule is to leave the parties where it finds them, giving no relief and no countenance to claims of that character. *Ibid.*

26. A bill filed by a creditor to compel the execution of a *trust*, is not a bill *quia timet*, nor does it partake of the

nature of such a proceeding. *McDougald et al. vs. Dougherty et al.*..... 570

27. Where titles to property are disputed before a Court of Chancery, a Jury alone is competent to determine the real truth of the fact. *Ibid.*
28. Neither the Chancellor himself nor the Master, will undertake to decide upon antagonistic claims to property. *Ibid.*
29. The duty of a Master is, mainly, to investigate accounts and audit them ; and for the purpose of facilitating their inquiries and rendering them more effectual, they are empowered to examine witnesses, and even parties to the cause. *Ibid.*
30. New parties may be introduced by amendment to the bill, even at the hearing, and it is utterly immaterial, whether they are made plaintiffs or defendants. *Ibid.*
31. Material amendments to sworn bills, must be verified. *Ibid.*
32. Every amendment is an indulgence granted by the Court, and is granted to the mistake of the parties, and with a view to save expense. *Ibid.*
33. When amendments are allowed, it should be upon such terms as not to injure others. *Ibid.*
34. If the new matter will affect the opposite party prejudicially, it should not have relation back to the time of filing the original bill, but the suit should be considered as pending, only from the time of the amendment. *Ibid.*
35. On a proper case made, it is competent for the Chan-

cellor to appoint a receiver on the *ex parte* application of the complainant, before answer, the facts being verified by his affidavit. *Williams and another vs. Jenkins*..... 595

36. A Court of Equity will appoint a receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their co-tenants, when the defendant co-tenants are insolvent. *Ibid.*

37. The general rule in Equity is, that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be parties, either as plaintiffs or defendants, however numerous they may be. *Carey, assignee, vs. Hoxey et al*..... 645

38. There are, however, exceptions. When the parties are beyond the jurisdiction, or are so numerous, that it is impossible to join them all, a Court of Chancery will make such a decree as it can without them. *Ibid.*

39. *Numerousness* does not always and necessarily constitute an exception, but if the parties in interest are so very numerous, that to join them would be impracticable, without almost interminable delays and other inconveniences, which would obstruct and probably defeat the purposes of justice, it is an exception to the general rule. *Ibid.*

40. The death of a party, where parties are numerous, will not authorize the complainant to proceed until his representatives are made parties, unless the numerousness is exceedingly great, and the deaths so frequent, that the delays incident to making parties, become almost interminable, and obstruct greatly the purposes of justice. *Ibid.*

41. In cases where the parties are numerous, and the representation of a deceased party is suspended by litigation, an exception is made, and the Court will proceed to a decree, if it can be done without prejudice. *Ibid.*
 42. In such a case, the Court must be fully advised by allegations in the bill, or by proofs, of the nature and condition of the litigation. *Ibid.*
 43. Whether a case comes within the exceptions, is a question for the Chancellor, in the exercise of a sound discretion, under all the facts of the case. *Ibid.*
 44. When a complainant seeks to surcharge and falsify a stated account, returned by an administrator to the Court of Ordinary, the burden of proof is upon him; consequently, the allegations in his bill, should be sufficient to admit the evidence for that purpose, at the trial. *Shorter et al. vs. Hargroves, administrator*..... 658
 45. Where there are only *mistakes and omissions* in a stated account, the party shall be allowed no more than to surcharge and falsify; but if it is apparent to the Court that there has been *fraud* and imposition in the settlement of the account, the whole may be opened. *Ibid.*
- See *Administrators, &c.* 3, 4, 7, 8. *Bill of Exceptions*, 1. *Debtor and Creditor*, 1. *Guardian and Ward*, 4. *Limitation of Actions*, 1. *Trespass*, 1 to 4.

EQUITY PRACTICE.

1. Where a bill in Equity is not answered, the same may be taken *pro confesso* at the *second* term, and a decree had thereon. *Guerry and Wife vs. Durham et al.*..... 9
2. The failure to give bond and security previous to the

ccry in this State, should be by written interrogatories settled by the Master. *Dougherty et al. vs. Jones et al...* 432

14. Proceedings before a Master in Chancery, are in the nature of an informal bill in Equity; and supervisory Courts will not interfere to correct their errors, unless substantial defects exist. *McDougald et al. vs. Dougherty et al.*..... 570
15. If any great right or public policy has been violated by the Master, relief will be granted, otherwise not. *Ibid.*
16. This *extra-judicial* mode of investigation is of great advantage, by relieving a Court of Chancery from the performance of burdensome duties, and enabling it to exercise its regular jurisdiction in a much more beneficial manner. *Ibid.*
17. Notwithstanding a bill is filed by a creditor at the instance of himself and all others who may wish to come in, still up to the time of the decree, it is a suit only between party and party. *Ibid.*
18. The complainant up to that time, may make any disposition of the case which he sees fit, and the defendant may tender satisfaction and compel him to accept it. *Ibid.*
19. Interrogatories to a party before the Master are in the nature of interrogatories in a bill in Chancery, and the answers are evidence to the same extent. *Ibid.*
20. According to the practice in England, and such is the correct practice here, a party interrogated before a Master in Chancery, has the right to demand that the questions be propounded in writing: *Aliter*, as to witnesses. The party may waive this privilege and submit to a *viva voce* examination, and it will be good. *Ibid.*

21. If one general exception is taken to the Master's certificate approving of interrogatories, and the Court is of opinion that one only of the interrogatories ought not to have been approved, the exception will be allowed; but if the exception is that the Master ought not to have allowed *any*, then if *one* was proper to be allowed, the general exception fails as to all. *Ibid.*
22. An application to let in a party to defend, after an order taking the bill *pro confesso*, is to the grace and favor of the Court, and resting in its sound discretion. Still it will not be refused upon a proper excuse being rendered and cost paid; provided the delay has not been extravagantly long, and provided also its allowance will not work a greater injury to the plaintiff than its refusal would to the defendant. *Carter et al. vs. Torrance et al...* 654
23. Ordinarily, in England, a party, whether plaintiff or defendant, who had made default at the hearing, and who had thereby suffered his bill to be dismissed, or a decree to be made absolute against him, was relieved upon the payment of costs. *Ibid.*
24. After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order. *Ibid.*

See *Equity*, 21 to 24.

ERROR.

1. When from the record it appears conclusively, that the proper decision was made, the proceeding will not be reversed on error, because bad reasons are given for it, unless the party was prejudiced thereby. *Wyche and Wife vs. Green*..... 159

2. In general, judgment on a writ of error, will follow success in the particular issue. It is proper, however, to examine the whole record, and to adjudge either for the plaintiff or defendant, according to the legal right, as it may, on the whole, appear, notwithstanding or without regard to the issue in law, which may have been raised and decided between the parties. *Stephen, (a slave) vs. The State*..... 225
3. Either party may except to the decision of the Chancellor, during the progress of a motion before him, but a writ of error cannot be filed, so as to operate as a *superseas*, until the main question involved in the original motion has been decided; and then the party against whom the decision of the main question involved in the original motion may be made, may except to such decision, file his writ of error, and include therein all his other exceptions, taken in the progress of the motion. *Jones et al. vs. Dougherty*..... 305
4. Where an *ex parte* application had been made for, and a writ of *certiorari* granted, but before a decision on the merits, a writ of error is sued out: *Held*, that it was sued out prematurely. *Van Ness vs. Cheesborough, Starns & Co*..... 377

See *Criminal Law*, 5. *Equity Practice*, 14, 15. *Practice Supr. Court*, 2.

ESCROW.

See *Bond*, 1, 2, 3.

ESTATE.

See *Legacy*.

ESTOPPEL.

1. A fact which has been directly tried and established by a Court of competent jurisdiction, cannot be contested again between the same parties or their privies, in the same or any other Court. A judgment or decree, is an estoppel to the parties thereto, and their privies, if it relates to the same subject matter, and decides the question in issue. But if that question came collaterally before the Court, and was only incidentally considered, the judgment or decree is no estoppel. Whether the question now in issue was embraced in the judgment or decree, cannot be ascertained by inference or by arguing from the judgment or decree. *Evans vs. Birge*..... 265
2. Query : Whether an estoppel by judgment or decree, should not be specially pleaded in this State. *Ibid.*
3. A party is not estopped from denying *any fact* which is recited in a Legislative Act. But although such recitals are not *conclusive*, they should be treated as true until the contrary appears. *Thornton vs. Lane*..... 459
4. A party who is sued and confesses judgment in a particular character, is estopped from denying that character afterwards. *Ibid.*

See *Bond*, 1. *Guardian*, 1. *Trusts and Trustee*, 1.

EVIDENCE.

1. To an action on a warranty of soundness of a slave by an administrator, the administrator pleaded a release, and proved by two witnesses, that a misunderstanding having arisen about the warranty, the purchaser told the witnesses "that he was satisfied about the negro, as he

- knew him better than the administrator, for he had a wife at his house:" *Held*, that this was no evidence to support the plea. *Aven vs. Beckom*..... 1
2. It is admissible for a witness to state that he was induced to waylay a party suspected of a design to commit a felony, from information derived from a negro. *Whaley vs. The State*..... 123
3. As a circumstance of guilt, it is competent to prove that the defendant offered to bribe one of his guard, in order that he might effect his escape. *Ibid.*
4. Notwithstanding a witness may testify that the confessions of the prisoner were made under threats, still, the Court may inquire what those threats were, in order to ascertain their sufficiency in law, to exclude the confessions. *Ibid.*
5. An illegal question may be asked; still, if the answer is unexceptionable, the judgment will not be reversed on that account. *Ibid.*
6. A memorandum made in pencil, in the pocket-book taken from the custody of the accused upon his arrest, may be read in evidence without proof of its execution. *Ibid.*
7. Parol evidence is incompetent to vary a trust in chattels, which is manifested in writing; where, however, the trust is discretionary, parol evidence may be admitted to show how that discretion was exercised. *Simms, administrator, vs. Smith*..... 195
8. In a prosecution for a rape, the fact of the woman's having made complaint, soon after the assault took place, is evidence. The *particulars* of her complaint,

- however, cannot be gone into, and she will not be allowed to name the prisoner, as the person who committed the injury, unless by way of *information* to lead to his arrest. *Stephen, (a slave) vs. The State*..... 225
9. A confession, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or the impression of fear, however slightly the emotion may be implanted, *is not admissible evidence. Ibid.*
10. It is no objection to the competency of confessions, that they were made while the party was in legal imprisonment. *Ibid.*
11. Negro testimony is inadmissible against a free white person. It is competent, however, to state that *certain acts were done*, in consequence of information received from a negro. *Grady vs. The State*..... 253
12. Where a draw had been given in for Wesley Yarborough's orphans, under the Land Lottery Act of this State, and a grant had issued to them in that capacity: *Held*, that it was competent to show by parol evidence, the *identity* of the persons mentioned in the grant, and that they were *illegitimate*, for the purpose of showing that their illegitimate half-brother, was their heir at law, under the Act of 1816. *Green vs. Barnwell et al.*..... 282
13. In order to make dying declarations admissible in evidence, the deceased must not only be actually *in extremis*, but he must believe that he is in a dying condition. And this consciousness may be inferred, not only from the statements of the party, but also from the nature of the wound and other circumstances. *Campbell vs. The State*..... 353

14. When a *prima facie* case is made out, the evidence should be submitted to the Jury, it being an *issue of fact* whether or not the declarations were made in the immediate prospect of death. *Ibid.*

See *Constable*, 1. *Constitution*, 3. *Corporations*, 10, 11. *Criminal Law*, 4, 6, 16, 17, 24 to 28. *Equity Practice*, 19. *Estoppel*, 3, 4. *Guardian and Ward*, 3. *Husband and Wife*, 4. *Registry. Res Gestæ. Set-off*, 1. *Vendor and Purchaser*, 1. *Will*, 1 to 9. *Witness*.

EXECUTION.

1. All levies of chattels, real and personal, of the defendant, must be satisfactorily accounted for before an execution will be allowed to interfere with property bought of the debtor by a third person and in his possession. *Dougherty vs. Marsh & Bryers*..... 277
2. It is not competent for a Justices' Court to re-open a *fi. fa.* which has been entered satisfied by the sale of land, on the ground that the entry was a nullity; no title to the property having passed to the purchaser. *Ibid.*
3. Where the legal effect of the judgment and execution is the same, any verbal variance is immaterial. *Thornton vs. Lane*..... 459
4. The indorsement of the execution by the Sheriff, of "*nulla bona*," is not even *prima facie* evidence of its return on that day. *Ibid.*
5. The time of the return of the execution is a matter in *pais*, and may be proven by *parol*. *Ibid.*
6. The Sheriff may enter "*nulla bona*," on a *fi. fu.* and put it in his pocket, and keep it till the return term, to which it is made returnable. *Ibid.*

7. If a Sheriff or Constable, having in his hands a *fi. fa.* has made one full examination for goods without effect, he may return the execution "*nulla bona.*" *Ibid.*
 8. Where an original execution has been lost or destroyed, a copy should be established, and not an *alias fi. fa.* issued. *Rushin vs. Shields & Ball*..... 636
 9. Under the laws of this State, an *alias fi. fa.* can only issue upon the revival of a dormant judgment. *Ibid.*
 10. If an execution creditor, having the *older lien* upon the fund in the Sheriff's hands, allows it, by his consent and direction, to be applied to a younger *fi. fa.* to the prejudice of third persons, it will be considered an extinguishment, *pro tanto*, of the creditor's lien. And it matters not under which execution the money was raised and brought into Court. *Ibid.*
- See *Constable*, 1. *Illegality*, 1, 2. *Sheriff*, 3. *Tax Collectors*, 1, 4 to 8. *Vendor and Purchaser*, 2.

EXECUTORS.

See *Administrators*, &c.

FORGERY.

See *Criminal Law*, 7, 8, 9.

FORMER RECOVERY.

See *Estoppel*, 1.

FRAUD.

1. Fraud and damage coupled together, will entitle the in-

- jured party to relief in any Court of justice. *Skrine vs. Simmons and Wife*..... 401

See *Will*, 6.

FRAUDULENT CONVEYANCES.

1. The fact that a man is *insolvent* when he transfers his effects does not make the conveyance void, and the same rule applies to corporations or artificial persons as to natural. *Thornton vs. Lane*..... 459

GARNISHMENT.

1. A receiver appointed by a Court of Equity, is not subject to the process of garnishment. *Field et al. vs. Jones et al.*..... 413

GIFT.

1. To transfer property by gift, there must be a deed or instrument of gift, or an actual delivery of the thing to the donee. *Wyche and Wife vs. Greene*..... 159

See *Charge of the Court*, 1.

GRANT.

See *Evidence*, 12.

GUARDIAN AND WARD.

1. Where a guardian for two orphan children returned to the Court of Ordinary, as a part of their estate, a negro slave, and annually returned the hire of said slave for ten consecutive years: *Held*, in a suit by one of the orphans after her intermarriage, for her share of the said

slave and his hire, that the guardian was estopped, on the ground of public policy and good faith, from denying the title of the orphans to the slave, and showing an independent title thereto in himself *anterior* to his appointment as guardian. *Scott, administrator, vs. Haddock and Wife*..... 258

2. A guardian in this State of the person and property of an infant ward, has the same right to judge as to what are necessities for his ward, according to her estate and position in society, that a parent has for his child. *Nicholson and Wife vs. Spencer*..... 607
3. Whenever it appears that such infant ward has a guardian, who has furnished her with such necessities as in his judgment he regarded ample and proper for her support, according to her age and condition, a tradesman who seeks to recover the amount of a bill of articles furnished such infant ward, in *addition* to those furnished by her guardian, must show the condition and estate of the ward, and the articles of necessity provided by the guardian, and that the same were *not sufficient* for her support, and that the *additional* articles were necessary for such support. In such a case the burden of proof is on *the plaintiff*, and not on *the defendant*. *Ibid.*
4. In this State, an infant who has a guardian appointed and qualified, according to the provisions of the Act of 1820, may maintain a suit in Equity by such guardian. *Shorter et al. vs. Hargroves, administrator*..... 658

HEIRS.

See *Administrators, &c.* 5.

HINES, R. K.

Proceedings on his death..... 133

HUSBAND AND WIFE.

1. Where the husband and wife are sued in the same action for a tort committed by the wife during the coverture: *Held*, that it is necessary that the wife be served with process; but if she appears and pleads to the merits, she waives her right to except to the want of service, and will be bound by a judgment rendered in the case against her. *Smith and another vs. Taylor and Wife*..... 20
2. If a distributive share of an intestate's personal estate accrue to a married woman during coverture, and the husband dies before distribution is made, and without any act on his part reducing it to possession, it survives to the wife. *Chappell, administrator, vs. Stallings and Wife*..... 25
3. H died, leaving a widow and *ten* children, and a paper purporting to be his last will and testament. He bequeathed the whole of his estate to *nine* children; upon the division, the husband of one of the daughters received two negroes; after the death of the husband, the probate of the will was revoked, and an intestacy declared, on account of the insanity of the testator, and the two negroes were returned to the administrator: *Held*, that the possession of the negroes by the husband, was not such, under the law, as caused his marital rights to attach, but the same belonged to the wife, by virtue of her survivorship. *Ibid.*
4. Cohabitation is presumptive evidence of the wife's authority to contract, and it is for the husband to rebut the presumption, by showing that the goods were supplied under such circumstances that he is not bound to pay for them; but where the husband and wife are living apart, the *onus* lies the other way, and it is for the tradesman to show that the separation has taken place under such

- circumstances as will render the husband liable. *Mitchell vs. Treanor*..... 324
5. *Subsequent* provision made by the Court for *past* alimony will not bar the right of recovery for goods previously furnished. *Ibid.*
6. If the tradesman supplies the goods to the wife, and gives the credit to her, the husband is not liable. *Ibid.*
7. Whether the credit was given to the wife or the husband, is a question of fact for the Jury. *Ibid.*
8. If by a marriage contract, property is vested in trustees for the benefit of the husband and wife and the fruit of the marriage, and subsequently an absolute divorce is granted to the husband, the wife may, after the divorce, by proper conveyances, (the trustees being parties thereto,) transfer all her rights and interests under the marriage contract, to her former husband, she being *quoad hoc a feme sole and sui-juris*. *McBride, administrator, &c. vs. Greenwood et al.*..... 379
9. A conveyance by the wife, of all her interest under the marriage contract, does not estop her from claiming the same property subsequently, as the heir or distributee at law of her child, the fruit of the marriage, who took the property in fee under the marriage contract. *Ibid.*
- See *Judgment*, 1. *Limitation of Actions*, 4 to 7. *Trusts*, &c. 1.

IDENTITY.

See *Evidence*, 12. *Practice Superior Court*, 4.

ILLEGALITY.

1. Upon affidavit of illegality, the validity of a judgment cannot be inquired into. *Mangham vs. Reed*..... 137
2. If the defendant makes an affidavit of illegality which is insufficient in law to arrest the *fi. fa.* the Sheriff is justified in disregarding it and proceeding with the sale of the property. *Sullivan and another vs. Herndon*..... 294

INDICTMENT.

See *Criminal Law*, 1, 3, 4, 7, 13, 15, 18, 22, 24, 25.

INDORSER AND INDORSEMENT.

1. Every indorser of a promissory note warrants that the note is valid, and that the maker is liable to pay it. *McNeill vs. Knott*..... 142
2. Upon a qualified indorsement to be liable in the second instance only, if the note has been previously paid by the maker, a right of action accrues immediately, in favor of the holder against the indorser. *Ibid.*

See *Bankrupt Law*, 2. *Promissory Notes*, 1.

INFANT.

See *Guardian and Ward*, 4. *Limitation of Actions*, 4 to 7.
Rape, 1, 2, 3.

INJUNCTION.

See *Equity Practice*, 2, 3. *Surety*, 1. *Trespass*, 1 to 4.

INSANITY.

See *Will*, 1 to 9.

INSOLVENT DEBTORS.

See *Fraudulent Conveyances*, 1. *Tax, &c.* 2, 3.

JUDGE.

1. Where the Judge of the Superior Courts of any one of the Circuits in this State, is a party to a suit, or interested therein, the Judge of any other Circuit has jurisdiction to preside at the trial of the same; notwithstanding the Justices of the Inferior Court *may* preside therein as provided by the Statute. *Winter vs. The Muscogee R. Co.*..... 438
2. A Judge may confess a judgment against himself in a suit in his own Court, to which he is a party. *Thornton vs. Lane.*..... 459

See *Charge of Court. Criminal Law*, 5. *Practice Superior Court*, 1.

JUDGMENT.

1. Where a married woman petitioned the Court of Chancery for the appointment of a trustee to protect what she supposed was her separate property, and such trustee was appointed and accepted the trust: *Held*, that such judgment did not prejudice the legal rights of the husband to such property, he being no party to it, nor his creditors, nor a *bona fide* purchaser from him. *Bryan, Trustee, vs. Duncan.*..... 67
2. A judgment rendered by a Court not having jurisdic-

tion of the person or subject matter, is void, and may be impeached whenever and wherever it is sought to be used as a valid judgment. *The Central Bank vs. Gibson*..... 453

See *Administrators*, &c. 5. *Estoppel*, 1, 4. *Illegality*, 1. *Judge*, 2. *Vendor and Purchaser*, 2.

JURISDICTION.

1. Where, by an Act of the Legislature, certain commissioners were authorized to assess the damages which the owners of town property might sustain by the removal of the County site: *Held*, that such commissioners had no jurisdiction to try the question of title to land; under the Constitution, that jurisdiction being vested in the Superior Court. *Strange vs. Bell*..... 103
2. It is not competent for a Justices' Court to re-open a *fi. fa.* which has been entered satisfied by the sale of land, on the ground that the entry was a nullity, no title to the property having passed to the purchaser; jurisdiction over the subject matter being restricted exclusively by the Constitution of the State to the Superior Courts. *Dougherty vs. Marsh & Bryers*..... 277
3. The clause in the Constitution of Georgia, which requires all civil cases to be tried in the County wherein the defendant resides, applies to corporations as well as natural persons. *The Central Bank vs. Gibson*..... 453
4. The Central Bank is suable alone in Baldwin County, and a judgment rendered against it in the County of Muscogee, by consent of the Director, waiving the jurisdiction, is void, both as to third persons and *inter partes*. *Ibid.*
5. Consent cannot confer jurisdiction in a Court, which it

does not possess by law, and a judgment rendered by a Court under such consent, is void as to third persons. *Ibid.*

6. Whether void as between the parties? Query.
7. When the Court has jurisdiction of the person and subject matter, and the defendant has some privilege which exempts him from the jurisdiction, he may waive the privilege, and in so doing will be bound by the judgment. *Ibid.*

See *Judge*, 1, 2.

JURY.

1. Where a Juror has been put upon triors and they have retired to make up their verdict, it is not proper to move the Court to send written instructions to the triors to propound to the Juror a particular interrogatory for the purpose of establishing his disqualification; the proper course is to have the triors brought into open Court and instructed publicly and in the presence of both parties, touching the whole matter. *Whaley vs. State*..... 123
2. Citizens of a County are competent Jurors to try an issue made on an execution issued against the Tax Collector and his sureties, for the County Taxes not collected and paid over according to law. *Basset et al. vs. Governor, &c*..... 207
3. According to the provisions of the Acts of 1799 and 1810, providing for the trial of causes by a special Jury, the parties are entitled to at least *eighteen* impartial Grand Jurors, from which to select a special Jury, and when the list of Grand Jurors furnished by the Clerk, shall be reduced to a less number than eighteen, by *challenges for cause*, it is the duty of the Court to direct the Sheriff or his

Deputy, to summon *talesmen*, so as to furnish the parties with a pannel of at least eighteen *impartial* Grand Jurors.
Winter vs. The Muscogee Railroad Co..... 438

See *Charge of the Court*, 1. *Criminal Law*, 12, 15. *Equity*, 18. *New Trial*, 2, 8. *Oath*, 1 2 *Practice Supr. Court*, 1, 2.

JUSTICES' COURTS.

See *Jurisdiction*, 2.

LAW.

1. What is *authority* in this State, and what *opinion* merely, considered. *Thornton vs. Lane*..... 459

LEGACY AND LEGATEE.

1. Where the will of a testator contained the following bequest : " I lend to my niece, M. E., one negro girl and her increase, Corboro, during my niece's natural life, and at her death, to the lawful issue of her body ; and in case my niece should die without issue or a minor, then it is my will and desire, that this negro girl Corboro, and her issue should revert to my niece Nancy, and in like manner, to the lawful issue of her body : *Held*, that the word *lend*, was equivalent to the word *give*, and vested such an estate in the legatee, as on her intermarriage, would vest the marital rights of her husband, and render it liable for his debts. *Bryan, trustee, vs. Duncan*..... 67

LIEN.

1. A lessee of steam saw mills, is neither *agent* nor *superintendent*, in contemplation of the Act of 1842. He may create a lien on the property for services rendered, or for

- supplies furnished the mill during his occupancy, to the extent of his unexpired term, but no further. The tenant cannot, by his contracts, encumber the reversion. *Harman et al. vs. Allen*..... 45
2. In a bill filed against subsequent purchasers, to enforce the vendor's lien, the Court may dismiss the bill at the trial, if there be *no evidence whatever* of notice of the lien. *Mounce vs. Byars et al.*..... 180
3. Notice of the vendor's lien, brought home to the agent of the purchaser, is constructive notice to the purchaser. *Ibid.*

See *Execution*, 10.

LIMITATION OF ACTIONS.

1. Where a bill was filed by the *cestui que trust* against the trustee, for the execution of an express trust: *Held*, that to make the Statute of Limitations available on demurrer as a bar, it must affirmatively appear on the face of the bill, that the period of time prescribed by the Statute had elapsed, from the time of the alleged conversion of the assets, before the filing of the bill. *Battle et al. vs. Durham*..... 17
2. Where a trust is executory and acknowledged as a continuing subsisting trust, there is no starting point for the operation of the Statute of Limitations. And it never will begin to run, until the trust is terminated by the separate act of one of the parties, or the joint act of both. *Simms, administrator, vs. Smith*..... 195
3. The Statute of Limitations does not run against a direct or express trust, so long as the trust continues, and is acknowledged to be a *continuing subsisting trust*; but

when the trust is denied by the trustee, and he claims to hold the trust funds or the trust property as his own, *adversely* to his *cestui que trust*, the latter having *knowledge* of that fact, the Statute will begin to run in favor of such trustee from the time of such adverse claim or possession. *Scott, admr. vs. Haddock and Wife*..... 258

4. Where there are two or more *co-existing* disabilities in the same person, at the time the cause of action accrues, as infancy and coverture, the Statute does not run until *all* are removed. *Ibid.*
5. But where there exists but *one* disability at the time the cause of action accrues, other disabilities arising afterwards cannot be tacked to the first disability, so as to prevent the operation of the Statute. *Ibid.*
6. Disabilities which bring a person within the exceptions of the Statute, cannot be piled one upon another, so as to defeat its operation ; but a party claiming the benefit of the *proviso* in the Statute, can only claim the benefit of the disability which existed when the cause of action accrued. *Ibid.*
7. *Thus*, where a bill was filed by husband and wife, to recover the property of the wife, in the hands of her guardian, the latter having repudiated the trust and claimed the property as his own, such *adverse* claim of the guardian being asserted during *the coverture*, and after the wife was twenty-one years of age : *Held*, that the wife was protected from the operation of the Statute of Limitations, she being a *feme covert* at the time the cause of action accrued. *Ibid.*
8. Where the maker of a promissory note was a non-resident at the time of its execution, but returned to the State *after its maturity*, so that he could have been sued

thereon : *Held*, that the Statute of Limitations commenced to run against the holder, from the time of the return of the maker into this State, so that a suit could have been instituted against him thereon. *Howell vs. Burnett*..... 303

See *Corporations*, 6.

MANDAMUS.

1. A writ of mandamus or prohibition, will not be granted by the Supreme Court to one of the Judges of the Superior Court, when acting as Chancellor, to restrain him from hearing and adjudicating a motion made before him, on the ground that one of the parties has excepted to his decision, on a point made before him, during the hearing and progress of such motion, and sued out a writ of error thereon, and filed bond &c., according to the Statute ; *there being no decision upon the main question involved in the original motion made before him. Jones et al. vs. Dougherty*..... 305

MARRIAGE CONTRACT.

1. The parties to a marriage contract may, by the consent of the trustee, dispose of their own interest under the contract. They cannot defeat the interest of remaindermen, not parties to the agreement. *McBride, administrator, vs. Greenwood et al.*..... 379

See *Husband and Wife*, 8, 9.

MASTER IN CHANCERY.

See *Equity* 27, 28, 29. *Equity Practice*, 13, *et seq.*

MERIWETHER, HON. JAS. A.

- Proceedings on his death..... 310

MISTAKE.

See *Bill of Exceptions*, 1. *Equity*, 4 to 14, 45.

MORTGAGE.

See *Surety*, 1.

NEW TRIAL.

1. Where there has been evidence in a cause submitted to the Jury on both sides, which is very conflicting, and no rule of law violated in its admission, it is error in the Court to grant a new trial on the ground that the verdict is contrary to evidence. The Jury, in such cases, are the exclusive judges, as to the weight of evidence and the credibility of witnesses. *Walker vs. Walker*..... 203
2. Where a Juror has been impannelled to try a cause, and during the trial, and before he has rendered his verdict, he shall be entertained by either of the parties at *their expense*, and the verdict is found in favor of the party so entertaining the Juror, the verdict will be set aside. *Ibid.*
3. In a case where the verdict of the Jury was in favor of the defendant, and there was no evidence applicable to the issue made by the pleadings in his favor, and there was evidence in favor of the plaintiff, a new trial will be awarded, upon the ground that there was no evidence to sustain the verdict. *Hampton vs. Thomas, administrator*... 317
4. If illegal testimony be admitted, a new trial will not be

granted, provided it is clear that there was evidence sufficient before the Jury, to authorize the verdict, independent of the illegal testimony. *Murphy vs. The Justices, &c.* 331

5. Where the evidence is contradictory, as to whether or not the dying declarations were made with the consciousness that the declarant was *in articulo mortis*, the Court will not interfere with the verdict of the Jury and grant a new trial, especially where it is satisfied that the finding was warranted by the proofs. *Campbell vs. The State...* 353
6. Where verdicts were manifestly against evidence, they have not been permitted to be disturbed, unless they evinced by their gross injustice, passion, partiality or prejudice. *Thornton vs. Lane.....* 459
7. The Supreme Court will be equally vigilant in upholding the power of the Court; and if the Jury decide the law differently from the Court, a new trial will be awarded, *toties quoties. Ibid.*
8. It is not good ground for a new trial, that a Juryman had said before the trial, "if the evidence was as he had heard it, the prisoner was guilty and would be hung." *Mitchum vs. The State.....* 615

See *Charge of the Court. Equity, 17. Seduction, 2.*

NOTICE.

See *Lien, 3. Vendor and Purchaser, 1, 2.*

NOTICE TO SUE.

See *Promissory Notes, 1.*

OATH.

1. The oath administered to Special Juries, on appeals in Common Law cases, is that which was originally prescribed for the Jury in Equity cases. *Thornton vs. Lane* 459
2. The word "equity," in the oath, is synonymous with "law," and does not mean some undefined and undefinable notion, which the Jury may entertain of the justice of the case, but a system of jurisprudence, governed by established rules, and bound down by fixed precedents. The Special Jury is sworn to try the cause "according to equity, and the *opinion* they entertain of the evidence," and not their *opinion of equity*, as well as the evidence. *Ibid.*

PARENT AND CHILD.

See *Seduction*.

PARTIES.

See *Administrators, &c.* 7. *Equity Practice*, 19, 20. *Equity*, 29, 37 to 43. *Guardian and Ward*, 4.

PLEADING.

1. A plea that before the right of action accrued upon the note which is sued on, to wit : in May, 1843, the defendant became a bankrupt within the true meaning and intent of the Act of Congress, in 1841 ; and that by reason thereof, the debt which is the foundation of the action, is fully discharged, and its recovery completely barred, is sufficient to admit the certificate of discharge. *McNiel vs. Knott* 142

2. If it was defective, the case being in the last resort, the defendant should be allowed to amend. *Ibid.*
 3. The party guilty of the first faulty pleading cannot demand a repleader. *Stephen, (a slave) vs. The State.....* 225
 4. Where a repleader is awarded, no error ought to be left upon the record. *Ibid.*
 5. Where the declaration is upon a domestic judgment, rendered in a Court of record, the plea of "*nil tiel record*" should conclude with a verification to the Court only: *Aliter*, where the suit is upon a *foreign* judgment, or the judgment of a Court not of record. *Thornton vs. Lane..* 459
 6. The plea of "*nil tiel record*" can only be pleaded to a record which is the gist or foundation of the record, and not to a record which is stated as inducement only. *Ibid.*
 7. A sale of property by an executor is, *pro tanto*, an administration, and he becomes chargeable, and may sue for the purchase money in his personal character, or in his representative character as *executor*; and when the action is in the latter form, the descriptive allegations are matters of substance, and it cannot be converted into an action in his individual right, by striking them out as *descriptio personæ*. *Aliter*, where he describes himself *executor*, &c. *Gilbert vs. Hardwick.....* 599
- See *Estoppel*, 2. *Husband and Wife*, 1. *Process*.

PRACTICE (SUPERIOR COURT.)

1. As to the right of the Court to interfere in directing and controlling the litigation before it. *Query? Hoskins vs. The State.....* 92

2. The relative duties of the Jury and the counsel in a cause, stated. *Garrison vs. Wilcoxson*..... 154
 3. It is not only the privilege of the Court, but its solemn duty, to interrupt counsel, when misstating the testimony to the Jury. *Grady vs. The State*..... 253
 4. The question of *identity* is a question of fact to be submitted to a Jury, and where there is any evidence of that fact, a nonsuit will not be awarded. *Greene vs. Barnwell et al.*..... 282
 5. It is the duty of the Court to administer justice *according to law*. And it is irregular and improper to call upon counsel to waive any legal right, in the presence and hearing of the Jury, who are charged with the case. *Terry et al. vs. Buffington and another*..... 337
 6. It is error in the Court, when requested to prevent it, to permit counsel to comment on facts, in their argument to the Jury, not in evidence. *Mitchum vs. The State*..... 615
- See *Appeal*, 1. *Criminal Law*, 10, 23. *Execution*, 8, 9. *Solicitor General*, 1.

PRACTICE (SUPREME COURT.)

1. Some general observations as to the mode of citing authorities in the Supreme Court. *Simms, administrator, vs. Smith*..... 195
 2. Parties are not entitled, as *of right*, to re-argue upon another writ of error, points which already have been solemnly adjudicated. *Thornton vs. Lane*..... 459
- See *Error*, 3.

PROCESS.

1. Process signed by a Deputy Clerk of the Superior Court, is as valid and sufficient in law, as if signed by the principal Clerk. *Goodwyn vs. Goodwyn*..... 178

PROHIBITION.

See *Mandamus*, 1.

PROMISSORY NOTE.

1. An indorser of a promissory note, *where the maker resides out of the State*, is not discharged, if the creditor, *on request*, neglects to proceed against the principals, until the note is barred as to them by the Statute of Limitations, there being no offer of indemnity to the holder, against the consequences of risk, delay or expense. *Prior vs. Gentry*.. 303

See *Limitation of Actions*, 8.

RAILROADS.

1. Where, by an Act of the Legislature, passed in 1845, a Railroad charter was granted to a Company, to build a road between certain points therein designated, and afterwards, in 1848, the defendant subscribed for 100 shares of stock in the Company ; and in 1850, the Legislature passed an Act, amending the original charter, by which the eastern terminus of the road was changed, running the road in a different direction from that contemplated by the original charter, and connecting it with another road : *Held*, that this was such a *material* alteration of the original contract, as would release the defendant from his stock subscription, unless *his assent* to such alteration could be shown. *Winter vs. The Muscogee Railroad Co*..... 438

See *Corporations*.

RAPE.

1. A rape may be committed upon an infant. *Stephen (a slave) vs. The State*..... 225
1. A child under ten years of age, cannot consent to carnal intercourse, so as to rebut the presumption of force. *Ibid.*
3. Will not the same presumption be made in favor of one over ten, who is still a child in stature, constitution, and physical and mental developments? *Query. Ibid.*

See *Evidence*, 8.

REGISTRY.

1. Where a deed is recorded, which is not by law required to be recorded, a certified copy from the record, would not be evidence. *Rushin vs. Shields and Ball*..... 636
2. If a deed is improperly admitted to record, the proof of its execution being insufficient, a certified copy of the record cannot be read in evidence. *Ibid.*
3. The irregular registration of a deed, is not even notice. *Ibid.*
4. The omission to state in the probate of a deed that it was *delivered* is essential. *Ibid.*

RECEIVER.

See *Equity*, 20, 25, 26. *Equity Practice*, 9, 10, 11. *Garnishment*, 1.

REMAINDERMEN.

See *Marriage Contract*, 1.

RES GESTÆ.

1. Declarations, to be a part of the *res gestæ*, must be contemporaneous with the main fact : but to be cotemporaneous, they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction ; if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it, as to preclude reasonably, the idea of deliberate design, then they are to be regarded as cotemporaneous. *Mitchum vs. The State*..... 615

See *Criminal Law*, 27.

SEDUCTION.

1. A father can maintain an action for the seduction of his daughter, living with him, and under his control, though she be of age. Nor is it necessary, in such case, to prove an actual contract for services between the father and his daughter. It will be presumed, from any services, however slight, rendered by her, in the family. *Kendrick vs. McCrary*..... 603
2. The legal foundation of the action rests upon the assumed relation of master and servant, and not upon that of father and child. *Nevertheless*, in such an action, the father may not only recover the damages he has sustained by the actual loss of service, and the payment of necessary expenses, but the Jury may award him compensation for the destruction of his domestic peace, as well as the disgrace cast upon his family. *Ibid*.

SET-OFF.

1. The Bank of Columbus, upon application of P. A. Clayton, one of its customers, rendered him an account current, showing a balance due him of \$1159 15, which purported to have been carried to "new account." It did not appear from the proof that any other account had been raised between the parties: *Held*, that to a suit against C. at the instance of the Bank, the defendant was entitled, without farther testimony, to the benefit of this acknowledgement, in support of his plea of set-off, to which the account rendered was attached. *Carey, assignee, vs. Clayton*..... 434

SALE.

See *Vendor and Purchaser*. *Sheriff's Sale*.

SHERIFF'S BOND.

See *Bond*, 3.

SHERIFF.

1. If the Sheriff has authority to sell property, a failure in the performance of any part of his duty, and for which he would be compelled to indemnify the owner to the extent of the injury received, would not destroy the title of an innocent purchaser. *Sullivan and another vs. Hearndon*..... 294
2. The illegal dispossession of the tenant by the Sheriff, under a sale made by him, is a *mere trespass*, which can be adequately compensated at Law, and to restrain which an injunction will not be granted. *Ibid*.
3. Where a Sheriff made a levy, and neglected to advertise

and sell the same for nearly six months, until it was too late to do so before the next term of the Court, and just prior to the session of the Court the defendant obtained an injunction restraining the plaintiff from collecting his *fi. fa.*: *Held*, that the Sheriff, by his negligence, was liable, on a rule, for the money, and could not protect himself under the injunction granted. *Neal vs. Price*.... 297

3. Where the Sheriff, to a money rule, returns that he had paid over the money: *Held*, that he must prove this averment. *Murphy vs. The Justices, &c.*..... 331
4. If the principal Sheriff executes a deed, in conformity to a sale made by one who claims to act as Deputy, this is a recognition of the Deputy's authority, and a ratification of his act; and is sufficient to protect the purchaser's title, had the Deputy acted without any regular appointment. *Brooks et al. vs. Rooney and another*..... 423
5. The acts of a Deputy *de facto*, are good as to third persons. *Ibid.*

See *Execution*, 4 to 7. *Illegality*, 2. *Slaves*, 2. *Surety*, 1.

SHERIFF'S SALES.

1. Tax Collector's sales, and all others made under summary proceedings and special powers, and by order of Courts of limited jurisdiction, must show upon their face that the pre-requisites of the law have been strictly pursued. It is otherwise, of sales made by Sheriffs, under the judgments and execution process of Courts of general jurisdiction. *Brooks et al. vs. Rooney and another*..... 423
2. To the purchaser, who pays his money and receives the Sheriff's deed, it is a matter of no consequence, whether the return of the execution be imperfect, or not made at

all. The irregularity or omission cannot affect the validity of his title. *Ibid.*

3. The purchaser at Sheriff's sale, depends upon "the judgment, the levy, and the deed; all other questions are between parties to the judgment and the officer." It is sufficient for the purchaser, that the Sheriff had competent authority to sell, and sold, and executed to him a title. His title is not created by, nor dependant on the return, but is derived from the previous sale made by the Sheriff, by virtue of his writ. *Ibid.*

4. The Acts, which make it the duty of the Sheriff to advertise the sale of property in a particular way, and to sell between certain hours of the day, are merely directions to the officer. His neglect to observe these directions, may subject him to a suit for damages, at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the Sheriff. *Ibid.*

5. A purchaser at Sheriff's sale, has a right to presume that a public officer known to possess the power to sell, has taken every previous step required of him by the law under which he sells. *Ibid.*

6. A Sheriff may sell, under execution after the death of defendant, and before administration granted. *Ibid.*

SLAVES.

1. One to whom a slave is *hired* for a year is entitled to no abatement of the price, because of the death of the slave after the commencement of the term. *Leonard vs. Boynton*..... 109

2. Where there is money in the hands of a Sheriff, from the

sale of a runaway slave, by virtue of a process issued in the name of the Clerk of the Inferior Court, on an order of the Justices of the Inferior Court, it is proper to move a rule against him in the name of the Inferior Court, and also, for the Justices of that Court to preside on the trial of an issue formed on a traverse of the Sheriff's return to such rule. *Murphy vs. The Justices, &c.*..... 331

See *Charge of the Court*, 1. *Criminal Law*, 12, 20, 21. *Evidence*, 11. *Verdict*, 1.

SOLICITOR-GENERAL.

1. Where a Solicitor-General in this State has, during his term of office, instituted a prosecution against a defendant, by preferring a bill of indictment against him for a violation of the law, public policy forbids that he should be allowed, after the expiration of his term of office, to be employed as counsel for such defendant, in that case. *Gaulden vs. The State*..... 47
2. When bail surrender their principal before final judgment on *sci fa.* to forfeit recognizance, the Solicitor General is entitled to his fee of five dollars, and *no more*. *Stamper et al. vs. The State*..... 643

STEAM SAW-MILLS.

See *Lien*, 1.

SURETIES.

1. Where a party is surety on a bond given by a Deputy Sheriff to his principal, and has taken a mortgage on personal property for his indemnity, and the high Sheriff and the Deputy have collected money, for which the high Sheriff is sued, and the Deputy has departed be-

yond the jurisdiction, and the mortgage' property has come into the hands of a third person, under a pretended claim, who is charged with an intention to remove it beyond the jurisdiction of the Court: *Held*, that a Court of Equity will restrain him by injunction, and require bond and security for its forthcoming, to answer the claim of the mortgagees. *Oullaw et al. vs. Reddick et al.*..... 669

See *Bond*, 3.

TAX AND TAX-COLLECTORS.

1. Tax-collectors have power in this State, to issue execution against defaulting tax-payers for the collection of taxes, which Constables and Sheriffs are bound to execute and return. *Lessee of Gledney, administrator, vs. Deavors*..... 79
2. The State is bound by public laws for the promotion of learning, the advancement of religion, and the support of the poor, although not expressly named. *Ibid.*
3. The State is bound by the Acts of the Legislature, exempting certain articles of property from levy and sale for debts, for the benefit of the wife and children of the debtor, and such property cannot be seized and sold under execution to pay the taxes due by him. *Ibid.*
4. It is the duty of the Collector of taxes to apply for a commission within twenty days after his election, but there is no law requiring the Governor to issue it immediately; and if the Collector does apply for his commission within time, and gives bond within ten days after he is notified that the commission has arrived, such bond is a valid statutory bond. *Bassett et al. vs. The Governor, use, &c.*..... 207

5. *Held*, also, that the commission must issue soon enough to allow the Collector ten days, before the first day of July, within which to qualify. *Ibid.*
6. It is not compulsory on the Justices of the Inferior Court to take bond and security of the Tax Collector, under the Act of 1821, for the collection and payment of the County taxes, but *discretionary*. When required, it is the duty of the Collector to give it, and upon failure to collect and pay over the County taxes, the Justices of the Inferior Court may issue execution thereon against him and his sureties. And whether such bond be taken or not, the sureties on his general bond, are liable to make good his default, in the collection and payment of the County taxes, and the Justices of the Inferior Court may issue execution against them for the same, in the name of the Governor, for their use. *Ibid.*
7. Such execution may issue at any time, and is properly returnable before the Justices of the Inferior Court; they being authorized to act in this regard as individuals, and not as a Court. *Ibid.*
8. The execution issues in such cases for the balance of the amount of the taxes assessed for County purposes, and not paid over on the first Monday in December, and it is not necessary that the execution be based on any order or judgment. Yet it is expedient that there should be such an order passed. *Ibid.*
9. Where the Inferior Court had authorized the Collector to receive County orders in payment of County taxes, and execution has issued against him for taxes unpaid, he is entitled to be credited thereon, for such orders only, as he may have turned over to the Court, or tendered to

them, or which he brings into Court and thus tenders.
Ibid.

See *Constables*, 1. *Sheriff's Sales*, 1.

TENANTS IN COMMON.

See *Corporations*, 12, 13, 14. *Equity*, 35, 36.

TENDER.

1. A tender, to be a bar, should be made by the debtor or his legal representatives, and not by a stranger. *McDougald et al. vs. Dougherty et al.*..... 1

See *Equity Practice*, 18.

TRESPASS.

1. Equity will not interfere to enjoin a mere trespass. There must be something special in the nature of the trespass, to authorize an injunction. *The Justices, &c. vs. The Griffin and W. P. P. R. Co.*..... 2
2. Equity will enjoin a trespass, when the damages cannot be proven at Law, and the remedy is on that account inadequate and incomplete. *Ibid.*
3. Whether the damage is or is not irreparable, is a conclusion of law, which the Court draws from the facts and circumstances set forth in the bill. *Ibid.*
4. A bill is filed to enjoin a trespass, and also to decree specific performance of an agreement: *Held*, that if the answer swears off the equity as to the agreement, yet

admits the trespass, the injunction will not be dissolved.

Ibid.

See *Abatement*, 1. *Costs*, 2, 3. *Sheriff*, 1, 2.

TROVER.

1. A defendant coming into possession of slaves as a loan, after the death of the lender, and with knowledge of the title to the plaintiff, derived by will from the lender, asserts title to the slaves, and declares that he will hold them in spite of them : *Held*, that this, coupled with user and acts of control, is a conversion. *Adams et al. vs. Mizell*..... 106

TRUSTS AND TRUSTEES.

1. W. a *feme covert*, applied to the Superior Court to have D. appointed trustee of certain slaves claimed as her separate estate. D. assented to the order, and accepted the trust, taking possession of the property : *Held*, that in a suit at the instance of W. the *cestui que trust*, D. was precluded from denying the trust and setting up title in the husband of W. in order to screen himself from accounting. *Duncan vs. Bryan, trustee*..... 63
2. A trustee may purchase the trust property from his *cestui que trust*, who is *sui juris*, provided there is a distinct *bona fide* contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should purchase, and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee. *Bryan, trustee, vs. Duncan*..... 67

See *Debtor and Creditor*, 1. *Evidence*, 7. *Guardian*, 1.

Husband and Wife, 8, 9. *Judgment*, 1. *Limitation of Actions*, 1, 2, 3. *Marriage Contract*, 1.

VARIANCE.

1. Where the legal effect of the judgment and execution are the same, any verbal variance is immaterial. *Thorn-ton vs. Lane*..... 459

See *Criminal Law*, 25.

VENDOR AND PURCHASER.

1. If facts are allowed to be proven, to affect a purchaser with notice, it is admissible for him to inquire into all the circumstances, which would show, that notwithstanding he bought with notice, still that he has a superior equity to his adversary. *Dougherty vs. Marsh and Bryers*..... 279
2. *Fi. fas.* having been entered satisfied, both by the return of the levying officer and the plaintiffs, and the credits thus endorsed being subsequently vacated by the Courts: *Held*, that lands sold by the execution debtor to a *bona fide* purchaser after the entry of payment, and before the *vacatur*, could not be affected by the judgment. *Ibid.*

See *Execution*, 1.

VENDOR'S LIEN.

See *Lien*, 2, 3.

VERDICT.

1. Upon an indictment against a slave for a rape upon a free white female, the verdict was, "we the Jury, find the prisoner guilty of an attempt to commit a rape:"

Held, that it was sufficiently full, and need not negative the charge of rape, that being the legal effect of the finding; neither was it necessary to add, *on a free white female*, that being the issue submitted. *Stephen, (a slave) vs. The State*..... 225

See *Criminal Law*, 15.

WARRANTY.

See *Administrators*, &c. 1.

WILL.

1. Testamentary capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will. *Terry et al. vs. Buffington and another*..... 337
2. For the purpose of shedding light upon the state of the testator's mind, when the will was made, evidence of its condition, both before and after that period, may be produced. *Ibid.*
3. As an independent fact, proof of incapacity at one period, is inadmissible to impeach a will made at another, long prior. *Ibid.*
4. Where testimony has been introduced, showing that the testator's mind was the same when the will was made, that it was at a subsequent period, when he was found to be *non compos mentis*, proof of his incapacity at the latter period, is relevant and proper to attack the will. *Ibid.*
5. When insanity is once found upon an inquisition of lunacy, it is presumed to continue, and the onus is cast upon those offering a will, to show that the disqualification has been removed. *Ibid.*

6. *Fraud* is a distinct head of objection to the validity of a will, from importunity and undue influence; usually they are the very opposite of each other. Both are equally destructive of the validity of a will. *Ibid.*
7. By the Statute law of some of the States, when insanity of the testator is alleged, the inquiry must always be, whether at the time of executing or acknowledging the will, the testator was capable of making a valid *deed or contract*. *And no inferior grade of intellect* will suffice. But such is not the rule of the Common Law, nor in Georgia. *Ibid.*
8. The right to the free enjoyment and disposition of one's property is required by the best interests of society. *Ibid.*
9. The phrase "a mere glimmering of reason," used in *Potts et al. vs. House*, 6 Ga. 324, explained and illustrated. *Ibid.*

See *Legacy and Legatee*.

WITNESS.

1. In a suit against one of several debtors, the plaintiff may call either of the others as a witness for him. *Thornton vs. Lane*..... 459
2. It is not competent to ask a witness as to what he had sworn on a former occasion, with a view to impeach him, if his testimony on that occasion, is of itself inadmissible in evidence. *Mitchum vs. The State*..... 615

See *Equity*, 29. *Equity Practice*, 20.

WRIT OF ERROR.

See *Error*.

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